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OF
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SUPPLEMENT TO
THE OHIO LEGAL NEWS.

VOLUME V.

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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Superior and Common Pleas Courts.

ACTIONS—WILLS.

[Lucas Common Pleas, April Term, 1894.]

WALTER J. CHASE ET AL. V. ARMINA D. ISHERWOOD ET AL.

1. An action can be maintained by an executor under sec. 6202, Rev. Stat., to obtain the judgment of the court as to the true construction of a will, only in cases where a trust is involved or where the executor has duties to perform, in carrying out the provisions of the will, which require the guidance or direction of the court.
2. A testator devised to his widow "the proceeds of his real estate." The will contained no residuary clause and made no other disposition of his real estate and gave no directions in relation thereto, and no authority or control over the real estate was given to the executors. Held, that no trust was created by the will, and no duties of the executors required the guidance or direction of the court, and that a petition filed by the executors under sec. 6202, Rev. Stat., should be dismissed for want of jurisdiction.

PUGSLEY, J.

The plaintiffs are the duly qualified executors of the last will and testament of Francis P. Isherwood, deceased. The defendant Armina D. Isherwood is the widow and the defendant Libbie M. Isherwood is the adopted daughter of the deceased. The testator by the first clause of his will directed that his debts be paid by his executors out of his estate. By the second clause he gave to his daughter the sum of \$10,000, to be paid by his executors in installments as his executors think best or the situation of circumstances may require. The third clause of the will is as follows: "I hereby give and devise to my dear wife, Armina D. Isherwood, in lieu of dower in my real estate, and in full of all rights of any kind in my personal and real estate, all of my personal estate of any and every kind remaining after the payment of my just debts and funeral expenses and the bequest of ten thousand dollars to my daughter Libbie M. Isherwood, and also the proceeds of my real estate."

In the remaining three clauses he appointed executors of his will and guardians of his daughter and revoked all former wills.

The plaintiffs have brought this action under sec. 6202, Rev. Stat., to obtain the judgment of the court as to the proper construction of the third clause of the will, it being alleged in the petition that they are in doubt as to the true construction of said third clause, and that they desire to be instructed as to their duties.

Section 6202, Rev. Stat., is as follows: "Any executor, administrator, guardian or other trustee may maintain a civil action in the court of common pleas against the creditors, legatees, distributees, or other parties, asking the direction or judgment of the court in any matter respecting the trust, estate or property to be administered, and the rights of the parties in interest, in the same manner, and as fully as was formerly entertained in courts of chancery."

A question is raised as to the jurisdiction of the court which it becomes necessary to determine, for unless the court has power under this section to construe the will, any judgment which it might render as to the true intent or meaning of the will, would be merely the expression of its opinion upon an abstract question and would have no binding force or effect upon the parties. The weight of authority is that the jurisdiction of the courts of chancery to construe wills is simply an incident of the general jurisdiction over trusts and that a suit will not be entertained which is brought solely for the purpose of interpreting the provisions of the will without any further relief or when the will makes no attempt to create any trust relations with respect to the property donated. Even by courts which take a more enlarged view of the jurisdiction, it is held that a suit will not be entertained to construe a will upon a state of facts which has not yet arisen nor upon a matter which is future and uncertain, nor unless the construction will determine and direct some present or continuing act or conduct of the executor or trustee, 3 Pomeroy's Equity, secs. 1156 and 1157, *Rothgeb v. Mauk*, 35 O. S., 503. In the case of *Collins v. Collins*, 19 O. S., 468, it is held that an action brought for the mere purpose of obtaining the opinion of the court upon the construction of a will cannot be maintained in cases where no trust is involved. In the case of *Corry v. Fleming*, 29 O. S., 147, it is held that when no trust is involved and no advice or guidance to an executor or other trustee is required, parties claiming under or against a will cannot maintain an action for the mere purpose of obtaining the court's opinion as to its meaning or legal effect. In view of these authorities the most that can be claimed is that an action can be maintained under the statute only in cases when a trust is involved or when the executor has duties to perform in carrying out the provisions of the will, which require the guidance or direction of the court.

It is contended by the plaintiffs that a trust is created by the will, which requires the executors to convert the testator's real estate into money, and pay the proceeds thereof to the widow. This claim is based solely upon that part of the third clause in which the testator gives to the widow "the proceeds of my real estate." To determine whether a trust is created or whether such a duty is imposed upon the executors by the will as is claimed, it is necessary to ascertain what is meant by the words "proceeds of my real estate." These words in themselves have no well defined legal meaning.

In *Thompson's Appeal*, 89 Pa. St., 36 the court say, "The word, 'proceeds' is a word of equivocal import. Its construction depends very much upon the context and the subject matter to which it is

applied. If a testator should direct his property to be sold and the proceeds to be disposed of in a certain manner, no one could doubt that the whole corpus or principal was intended. Should he order it to be rented or invested, then proceeds would necessarily be limited to the net income, especially if the interest was given for life only." In this will the testator devised to his widow the proceeds of his real estate. There is no residuary clause and no other clause which contains any reference to any other disposition of his real estate, near or remote. There is no direction that the real estate shall be sold nor that anything shall be paid out of the proceeds, and no authority or control of any kind is given over the real estate to the executors. There is simply a direct devise to the widow of the proceeds of the real estate and that is all.

The great weight of authority is that a devise of the rents and profits of land or of the income of land is a devise of the land itself and carries the legal as well as the beneficial interest therein. The devise will be for life or in fee according to the limitations expressed in the devise, and when the devise is unlimited, it vests in the devisee an absolute title in fee. *Davis v. Williams*, 85 Tenn., 646; *Drusalow v. Wilde*, 63 Pa. St., 170; *Bowen v. Swander*, 121 Ind., 175; *Mannex v. Greener*, 14 Equity Cases (L. R.), 456.

In the case of *Carlyle v. Cannon*, 3 Rawle, 488, it was held that a devise of the third part of the proceeds of an estate is equivalent to a devise of a third part of the estate itself.

In the case of *Hunt v. Williams*, 126 Ind., 493, it was held that a devise to the wife of one-half of the proceeds of a farm vested in the widow, an interest in the land. The court say, "The word 'proceeds' is one of equivocal import and of great generality. It does not necessarily mean money, its meaning in each case depending very much upon the connection in which it is employed and the subject matter to which it is applied. Here was a direct devise to the widow, no trust was created, and no duty was laid upon anyone to take possession of the farm, and render it productive of income. A devise of the proceeds of real estate is not materially different from a devise of the income, and the rule is that a devise of the income of land carries an estate in the land."

In the case of *Crain v. Wright*, 114 N. Y., 307, the testator gave fifty acres of land to his widow to have and to hold for her benefit and support. The statute of N. Y. provides that upon a devise of land, all the estate of the testator passes unless an intent to pass a less estate is necessarily implied. It was held that no intent to pass a less estate than a fee could be necessarily implied in the terms of the devise, and that the widow took a fee. Our own statute (sec. 5970, Rev. Stat.) is similar. It provides that every devise of lands, tenements or hereditaments, shall be construed to convey all the estate of the deviser therein, unless it shall clearly appear by the will that the deviser intended to convey a less estate.

In the case of *Collier v. Grimesey*, 36 O. S., 21, Judge White in delivering the opinion of the court, says: "We do not question that a devise of the rents and profits or of the profits and benefits of land without qualification or limitation will impliedly carry the fee, but such terms cannot be held to carry the fee, when it appears from other parts of the will that the fee is otherwise disposed of."

Independently of some statutory provision the executor has no power to sell land unless he is directed by the will to do so either

expressly or by implication. No authority is cited that such power is implied solely from a devise to another of the proceeds of land and it does not appear that such power is needed to carry out any of the provisions of the will. It is sufficient to say for the purposes of this case that no trust is created by the devise to the widow of the proceeds of the testators real estate and that the will imposes no duties upon the executors with reference to the real estate. The real question sought to be determined in this action, namely, whether the widow has the fee of the land, as claimed by her, or only a life estate with remainder to the daughter, as claimed by the daughter, is a question solely between the widow and daughter and one with which the executors have no concern. In the case of *Rhea v. Dick*, 34 O. S., 420, it was held that a person in possession of real property may maintain an action to quiet his title against a person who claims an estate or interest in the property adverse to the title of the party in possession and that it is not necessary that the adverse claim should relate to or affect the right of present possession. In that case the claim of the defendants was to a vested remainder in fee, subject to a determination of a life estate in the plaintiff, and the action was held to be rightly brought. Whether under the authority of that case, the widow may bring an action to quiet her title against the adverse claim of the daughter it is not necessary to decide, but for reasons already stated my conclusion is that no binding judgment can be rendered in this action as to the proper construction of the will. The petition is therefore dismissed on the ground that the court has no jurisdiction of the subject of the action.

J. W. Cummings, for plaintiffs.

J. K. Hamilton, for defendant, Libbie M. Isherwood.

FORCIBLE ENTRY AND DETAINER.

[Hamilton Common Pleas, 1894.]

MILLER v. SCHMIDT.

Section 6607, Rev. Stat., construed with secs. 6608 and 6547, Rev. Stat. does not in forcible entry and detainer, limit the right of trial by jury to a demand either on return or appearance day.

ERROR to record of Justice of the Peace in Forcible Entry and Detainer.

BUCHWALTER, J.

The plaintiff in error, Miller, was summoned May 11, 1894, by the constable on a summons returnable May 15, 1894, and naming therein nine o'clock A. M., May 15, 1894, as the appearance day and hour.

On appearance day the cause was continued until May 16th, at one o'clock P. M., when the parties appeared in court and Miller demanded trial by jury, which the justice refused; therefore the justice proceeded to hear without a jury, and gave, judgment of restitution of the premises in favor of Louisa Schmidt and against Miller, to all of which Miller excepted, and presents his complaint by a bill of exceptions.

Section 6607 provides that "if the suit be not continued, place of trial changed, or neither party demand a jury upon the return day of the

Miller v. Schmidt.

summons, the justice shall try the cause." * * * This section is found under Chap. 9, under title, "Forcible entry and detainer."

Section 6608 provides "If a jury be demanded by either party, the proceedings until the impaneling thereof shall be in all respects as in other cases." * * *

Section 6547, Chap. 6, "Trial and its incidents," provides: "In all civil actions after the appearance of the defendant and before the court shall proceed to inquire into the merits of the cause, either party may demand a jury to try the action." * * *

It was held in 39 O. S., 534, *Bonham v. Mills*, that the demand for a jury made on the appearance day, (to wit, April 9, 1879), although one day subsequent to the return day, (to wit, April 8, 1879), was good, and in the opinion by the court it is stated that the opinion of Doyle, J., in *Hill v. Hollister*, 8 Dec. Re., 116, (Lucas Common Pleas Court), is in accordance with this view (Judge Doyle being a member of the Supreme Court announcing the opinion as above).

It will be observed that the case at bar does not come within the statement of facts set forth in *Bonham v. Mills*, but it is fully within the facts in *Hill v. Hollister*. In that case the cause was twice continued for trial, and on the final trial day the defendant demanded a jury, but was refused, which judgment of the justice was reversed for this error. The history of legislation in this state is forcible entry and detainer is therein fully set out, which need not here be repeated, but from it all the inference is made, that sec. 6607, constructed with 6608 and 6547, does not in forcible entry and detainer limit the right of a trial by jury to demand on either return or appearance day, that the legislature did not mean to confer jurisdiction on the justice to try such cases unless a jury were demanded any time before trial, as in civil actions generally, and did not intend to discriminate against this class of cases as to the right of trial by jury.

I know of no other reported ruling in construction of sec. 6607, nor of any local ruling in our practice in these courts, and, therefore, deed it proper to conform to the construction adopted in *Hill v. Hollister*, supra.

Shay & Cogan, attorneys for plaintiff.

SLANDER—LIMITATION.

[Superior Court of Cincinnati, Special Term, 1894.]

PEARL V. KOCH.

Section 4988 of the Rev. Stat. requires that action for slander shall be commenced within one year. In a court of law this statute must receive a strict construction, and no exception can be introduced not authorized by the legislature. The statute of limitations will commence to run from the time the alleged slanderous words are spoken, and not from the time the plaintiff first had knowledge of the fact that they had been spoken.

HUNT, J.

This is an action for slander. The amended petition alleges that the defendant maliciously spoke of and concerning the plaintiff, certain false and malicious representations concerning the character, integrity and business qualifications of the plaintiff. The slanderous words were

Superior Court of Cincinnati.

spoken, as the plaintiff is informed and believes, in the month of September, 1892, but were not known to the plaintiff, nor did the plaintiff hear of the alleged slanderous language until within three months of the filing of the petition.

The case is before the court on a demurrer to the amended petition on the ground that the cause is barred by the statute of limitations.

Section 4979 of the Rev. Stat. provides that civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of the action accrues.

Section 4983, within one year.

An action for libel, slander, assault, battery, malicious prosecution, or false imprisonment.

The question raised by the demurrer is whether the cause of action occurred at the time they were spoken, or whether the statute of limitations commenced to run only when the plaintiff first heard of the slander.

In *Kerns v. Schoomaker*, 4 O., it was expressly held by the court that the statute of limitations commenced to run so soon as the injurious act complained of is perpetrated, although the actual injury is subsequent and could not immediately operate. This was an action on the case to recover damages of the defendant for negligence and omission of duty as justice of the peace. The defendant pleaded the statute of limitations. The plaintiff replied that his action was brought within one year after his rights were discerned. To this reply there was a general demurrer, and the demurrer was sustained. The court says that of *Baltley v. Faulkner*, 3 C. and A., 288, was exactly this case, for there the issue depended upon the issue of another suit, and could not be assured by a jury until the final result of that suit was definitely known. Yet it held that the plaintiff should have instituted his action and was barred for not doing so. In *Howell v. Young*, 5 B. and C., 254, the same doctrine is affirmed, and the statute held to run from the time of the injury, that being the cause of the action, and not from the time of damages of discovery of the injury.

In *Fee's Administrator v. Fee*, 100 R., 470, it was held that a fraudulent concealment by which the plaintiff has been delayed will not enlarge the time for bringing an action under the statute of limitations. The defendant plead that the action did not accrue within six years, and the defendant replied that the defendants, in the lifetime of the intestate, received the money without the knowledge of the intestate and until his death fraudulently concealed the same from him, and that the intestate did not know of the receipt of the money, nor did the plaintiff, as his administrator, know of it until within six years before the commencement of his action. To this replication there was a demurrer.

The court laid down the rule in this case that the cause of action accrued on the receipt of the money. It is not sufficient in order to avoid the effect of the statute to aver that the party was ignorant of the fact that he had a cause of action. The plea of the statute goes to the existence of the cause of action, and not to knowledge of it. It must be remembered that at the time this case was decided the statute contained no exception when facts were concealed from the party injured by the fraud. In this case the plaintiff claimed that the statute did not run, as the facts were fraudulently concealed. The court uses this language: "The most luminous and best considered case to be found in all the books is undoubtedly that of *Troup v. Smith*, 20 Johns, 53.

It was there held in an action of assumpsit for negligence and unfaithfulness in the performance of work, that the plaintiff, in answer to a plea of the statute, can not reply a fraudulent concealment of the badness of the work, in consequence of which the plaintiff did not discover the fraud until within six years. The distinction between courts of chancery and courts of law was stated and unanswerably enforced.

"The reason why," continues the court, "a party may avail himself of the fraud in the former courts is well explained by Lord Redesdale in 2 Sch. and Let., 634. Although the statute, he says, does not in terms apply to suits in equity, it has there been adopted in analogy to this rule of law. And the reason which he gives why, if the fraud has been concealed by the one party until it was discovered by the other, it shall not operate as a bar, is, that the statute ought not in conscience to run the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time (?) But, in a court of law, the statute must necessarily receive a strict construction. The court cannot introduce an exception to the statute which the legislature has not authorized. In *Evans v. Bichnell*, 6 Ves., 174, Lord Eldon, in noticing the position of some of the common law judges in *Paisley v. Freeman*, 3 T. R., 51, that if there was relief in equity, that there ought to be relief at law, observes that it was a proposition excessively questionable, and that it could only have been made from adverting to the constitution and doctrine of a court of chancery. * * * The law of Ohio, like that of New York, contains a saving in favor of infants, femme-coverts, non-residents and persons non compos, but it does not make fraud one of the exceptions. The true inquiry, therefore, at law, is when did the cause of action arise, and not when did knowledge of that fact come to the plaintiff, or by what circumstances was he prevented from obtaining the information. There are questions which may be properly addressed to a court of chancery, but of which a court of law is bound to have no knowledge."

We have thus seen that in an action at law under the act of February 13, 1831 (3 Chase, 1768, and under the code before the amendments of April 13, 1867, 64 O. L., page 145), fraudulent concealment of the cause of action did not prevent the running of the statute. *Kern v. Schoomaker*, 40, 331; *Fee v. Fee*, 100, 469; *Lathrop v. Snelbaker*, 6 Ohio St., 276; *Howe v. Minnick*, 19 Ohio St., 462. A similar ruling has been made by the court of exchequer in England. *The Imperial Gas Light & Coke Company v. The London Gas Light Company*, 26 Eng. Law and Eq., 425; *Hunter v. Gibbons*, 1 Hurl and Nor., 479. The last case was an action of trespass or trespass on the case, but the plaintiff was not allowed to reply as an equitable answer. Under sec. 85 of the common law procedure act of 1854 to a plea of the statute of limitations, that the trespass was under ground, and had been fraudulently concealed from the plaintiff till within the period of limitation before suit, *Pollock, C. B.*, said, "if a man could reply to a plea of the statute that his debtor had prevented him from suing by the fraud, the equitable replication would be as common as the promises of payment which people used to prove before Lord Tenterden's Act."

The Supreme Court in *Howe v. Minnick*, 19 O. St., 462, in giving constructions to the act of April 13, 1867, says that the terms "relief on the ground of fraud," are derived from courts of equity, and while we do not say that the clause of the statute in question, under the remedial system of the code is to be confined to cases which were formerly of

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exclusive cognizance in courts of equity, yet it can be extended to no case in which fraud is not the ground or gist of the action. The gist of the action is not fraud, but the taking of property by force, in respect to which, as constituting a cause of action, the intent with which the act is done is not material.

The Supreme Court continuing says: "That the view we have as to the meaning of the provision of the statute in question, is in accordance with the legislative understanding is apparent. * * * In the amended section, all of the original section is preserved, and a new provision added, declaring 'that in an action for the wrongful taking of personal property, the cause of action shall not be deemed to have accrued until the discovery of the wrongdoer.'"

The decision of the court was to the effect, that prior to the act of April 13, 1867, an action for the wrongful taking by force of personal property was barred in four years; and that the fact that the taking was under circumstances constituting larceny, and that the defendant concealed his guilt from the plaintiff, did not prevent the running of the statute.

In *Douglass v. Corry*, 46 O. S., 349, it was held that when an attorney collects money for his client, and uses no fraud or falsehood to him in regard to its receipt, the statute of limitations begins to run from the time of its collection. In that action the court sustained a demurrer to the petition on the ground that the action was barred by the statute of limitations, when it appeared on the face of the petition that the collection was made by an attorney, for a client, more than six years prior to the commencement of the action and in the absence of any averment of any misrepresentation or concealment of its collection by the attorney.

It is true that the decision in *Fee's Administrator v. Fee*, 10 O., 470, was rendered at the December Term, 1841, but the reasoning of the court is good so far as the case at bar is concerned. While there may have been amendments to the act of April 13, 1867, now sec. 4982 of the Rev. Stat., relating to the discovery of fraud, yet sec. 4983 declares in express terms that an action for libel or slander shall be commenced in one year. In a court of law the statute must receive a strict construction, and an exception can not be introduced which the legislature has not authorized.

The demurrer to the amended petition will be sustained and the petition dismissed.

Brown & Hoffheimer, for the demurrer.

Heintz, contra.

ATTORNEY AND CLIENT.

[Lucas Common Pleas, April Term, 1894.]

KATHARINE VILLHAUER, ADMX., v. TOLEDO (CITY).

1. The authority of an attorney is terminated by the death of his client unless such authority is coupled with an interest.
2. A contract between a client and his attorney that the attorney shall receive as compensation for his services a certain percentage upon the sum recovered does not create such an interest as will prevent the death of the client from operating as a revocation of the attorney's authority.

Villhauer v. City of Toledo.

3. An attorney was employed to collect a claim against the city under a contract that he was to have for his services one-half of the sum recovered. After the recovery of a judgment the client died and thereafter the city paid the judgment to a third person upon the order of the attorney. No part of the amount paid was received by the administrator of the client and the acts of the attorney were not ratified by the administrator. Held, that such payment of the judgment was unauthorized and the administrator may maintain an action against the city on the judgment.

PUGSLEY, J.

This is a motion for a new trial. The action is upon a judgment and the defense is payment. At the conclusion of the testimony the court directed a verdict for the defendant, with the understanding that the questions of law involved might be presented upon a motion for a new trial, when they could be more fully examined and considered.

The undisputed facts are these: Upon the seventh of December, 1885, one John Villhauer recovered a judgment in this court against the defendant for the sum of \$531.31. That judgment was based upon a claim for the balance due (and interest) upon an award of damages theretofore made in favor of Villhauer, by reason of the change of grade of a street. Upon the fourth of October, 1889, Villhauer died. At the time of his death proceedings in error were pending in the Supreme Court to reverse this judgment, and in April, 1890, the judgment was affirmed. Dodge & Raymond, a firm of attorneys composed of Charles Dodge and E. P. Raymond, were the attorneys of record for Villhauer, and acted for him in the prosecution of the case and obtaining judgment. In June, 1890, Dodge & Raymond in writing authorized the sinking fund trustees of the city of Toledo to pay the amount of this judgment to Paul Raymond. Such payment was made, and the trustees took a receipt for the same from E. P. Raymond. The receipt was signed "John Villhauer, per E. P. Raymond, attorney," and was recorded upon the appearance docket of that case. In March, 1891, the plaintiff was appointed administratrix of the estate of John Villhauer, and in October, 1893, she brought this action to recover from the city the amount of this judgment and interest. The death of Villhauer was known to both the attorneys and the city, at least there is no evidence that it was unknown.

It is claimed by the plaintiff, first, that the death of John Villhauer terminated the authority of Dodge & Raymond to act as attorneys in the case, and that any payment thereafter made by the defendant to Dodge & Raymond was unauthorized and would not bind the plaintiff; and second, that the payment made by the defendant to Paul Raymond was without authority, and did not discharge the judgment.

It is well settled that the authority of an agent is instantly terminated by the death of the principal, unless such authority is coupled with an interest in the subject matter of the agency. And this rule applies to the relation of attorney and client. The first question, therefore, to be decided, is, whether the authority of Dodge & Raymond as attorneys for Villhauer was coupled with an interest. I will read from the record in this case one question and answer in the testimony of E. P. Raymond:

Q. What if any contract did you have with Mr. Villhauer in respect to that case? A. I made arrangements with him personally, that in case I recovered I was to have one-half for the service. I was to take my chances upon a recovery; if there was no recovery, I was to have nothing.

This is all the testimony in the record as to the nature or the terms of the employment of Dodge & Raymond. They were employed in the ordinary way to prosecute and collect Villhauer's claim against the city, with the agreement that as compensation for their services they should have one-half of the amount recovered.

The question as to the nature of the interest which will prevent the death of the principal from operating as a revocation of the power of the agent has been considered in numerous cases. The case of *Hunt v. Rousmanier*, 8 Wheat., 174, is a leading case, and one that is always referred to in the discussion of this question. Chief Justice Marshall, in delivering the opinion of the court, says: I will read from *Mechem on Agency*, sec. 242:

"This general rule, that a power ceases with the life of a person giving it, admits of one exception. If a power be coupled with an 'interest' it survives the person giving it and may be executed after his death. As this proposition is laid down in the books too positively to be controverted, it becomes necessary to inquire what is meant by the expression 'a power coupled with an interest?' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing.

"The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest. The power and interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power to produce the interest must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it.

"But the substantial basis of the opinion of the court on this point is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such a case is the act of the principal, to be legally effectual, must be in his name, and must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. He is no longer a substitute acting in the place and name of another, but he is a principal acting in his own name in pursuance of powers which limit his estate. The legal reason which limits the power to the life of the person giving it, exists no longer; and the rule ceases with the reason on which it is founded."

There is also a reference by the author in this same section to another case, where the judge says:

"A power is simply collateral and without interest, or a naked power, when to a mere stranger, authority is given to dispose of an interest in which he had not before, nor has by the instrument creating the power, any estate whatsoever; but when a power is given to a person who

derives under the instrument creating the power or otherwise, a present or future interest in the property, the subject on which the power is to act, it is then a power coupled with an interest."

I have a reference also to some other cases. In the case of *Houghtaling v. Marvin*, 7 Barbour, 412, it is said that:

"The interest which will authorize the execution of the power after the death of the principal, must be an interest in the thing itself which is the subject of the power, and not in the proceeds or avails of such thing. If there is merely a power to a creditor to receive a debt, expressly for the purpose of liquidating the claim of the creditor, unaccompanied by an actual assignment of the debt or by any security to which the power might have been ancillary, it is revoked by the death of the principal."

In the case of *Easton v. Ellis & Morton*, 1 Handy, 71, one B. G. Easton had money on deposit with Ellis & Morton, who were bankers. In writing he authorized these bankers to pay all checks which were drawn upon them by one E. Easton. After the death of B. G. Easton, Ellis & Morton paid some checks which had been drawn by E. Easton, they at the time having no knowledge of the death. This action was brought by the administratrix of B. G. Easton against Ellis & Morton to recover the amount of these checks which were so paid. I refer to this case simply for the purpose of reading briefly from the opinion of Judge Gholson (page 76):

"In the present case, the money on deposit with Ellis & Morton, unquestionably, at the time the authority was given, the individual property of B. G. Easton, must be considered the thing which was the subject of the power. It is clear to my mind that no interest in that money passed to E. Easton. It may be that, by the exercise of the power, he would have derived a benefit under the business arrangements existing between him and B. G. Easton. The exercise of the power might have brought the money of B. G. Easton as capital into the business, in the profits of which, under the articles of agreement shown in evidence, E. Easton was entitled to share; but there was nothing in the transaction to transfer to E. Easton an interest in the money. He could only act, in reference to it, as the agent of B. G. Easton.

"It is therefore my conclusion that this case has not been brought within the only exception I feel authorized to admit to the general rule that the authority of the agent ceases at the death of the principal. I believe that the defendants in the case had no knowledge of the death of the principal, and acted with entire good faith. The general rule of law to be applied in this case may, therefore, operate hardly, as other general rules not unfrequently do; but courts are not authorized to engraft exceptions to meet the hardships of particular cases."

In the case of *Hartley's Appeal*, 53 Pa. St., 212, it is held that:

"A power of attorney to collect moneys, etc., for the principal, the attorneys to receive as compensation 'one-half of the net proceeds,' is not a power coupled with an interest, and is revocable. In the absence of an express stipulation, to make a power of attorney irrevocable, there must co-exist with the power an interest in the thing to be disposed of or managed."

In the case of *Flanagan v. Brown*, 70 Cal., 254, it is held that:

"When the owner of a promissory note delivers it endorsed in blank to another, with power to manage, transfer, or dispose of it, under an agreement whereby its proceeds are to be equally divided between them,

the transferee is a mere agent for collection, and a release of the note subsequently executed by the owner to the maker is a defense to an action against him by the agent. In such a case, the power of the agent is not coupled with an interest."

The court say :

"A power coupled with an interest is where the grantee has an interest in the estate as well as in the exercise of the power. It is determined to exist or not, accordingly as the agent is found to have such estate or not before the execution of the power. If his interest is only a right to share the proceeds which result from the execution of the power, the agent has not a power coupled with an interest."

In the case of *Coney v. Sanders*, 28 Ga., 511, it is held that :

"In order that a power may be a power coupled with an interest, the agent must have an interest in that to which the power relates, and it is not enough that he pays a valuable consideration for the power."

Now, applying the principles of these decisions to the case at bar, I am of the opinion that the authority of Dodge & Raymond as attorneys for Villhauer, was not coupled with an interest. No interest was assigned to them, either in the claim which they were employed to prosecute or in the judgment that was recovered; and the contract of employment being simply a stipulation as to the compensation which they should receive for their services, cannot be regarded as amounting to an equitable assignment either of the claim or of the judgment. Their compensation was not payable upon the simple recovery of the judgment, but only when the judgment or some part of it should be paid, and their interest was only in the proceeds or avails of the judgment; and if they collected the judgment, these proceeds or avails could only be realized through the exercise by them of their authority as attorneys. Dodge & Raymond could not act in their own names in collecting the judgment or in discharging the judgment. They could only act as attorneys for Villhauer during his life, or as attorneys for his legal representative after his death. They had no interest which they could assert in their own names and the release of this judgment which was given by E. P. Raymond, as attorney for John Villhauer, or in the name of John Villhauer, he being dead, was not a valid or proper release.

It does not follow, however, from this holding that the contract which Dodge & Raymond had with Villhauer as to their compensation was revoked or annulled by his death. It is held in certain cases that where by contract the fee of the attorney is contingent upon the amount recovered the client may at any time, without cause, discharge him and revoke his agency, subject to the right of the attorney to recover his compensation, as if his contract of employment was fully performed. It is said in these cases that such a contract is to be construed as fixing the mode of compensation only. I refer to the cases of *Kersey v. Garton*, 77 Mo., 645; *Ronald v. Mutual Association*, 30 Fed. Rep., 228; *Tenney v. Berger*, 93 N. Y., 529. The same rule laid down in these cases, it seems to me, will apply when the agency is revoked by the death of the principal. His power to act as agent ceases, but his right to compensation for his services, with such protection as the law secures to him, still exists, and may be enforced.

In Ohio an attorney has no lien as such for his services upon a judgment which he has obtained for his client, in the absence of any contract giving him such lien. The rule is thus stated in the case of *Diehl v. Friester*, 37 O. S., 477.

"Although an attorney may contribute his skill and services in obtaining a judgment for his client, he has, in this state, no lien on such judgment for his fees, where there is no agreement for such lien known to the judgment debtor, in the sense that such judgment debtor may not effectually satisfy such judgment by payment of the amount thereof to the judgment creditor; nor do we doubt the right of parties to compromise any pending suit, in opposition to the wish of their attorneys. But, on the other hand, an attorney may have a claim upon the fruits of a judgment or decree which he has assisted in obtaining, or upon a sum of money which he has collected, and under some circumstances courts will aid him in securing or maintaining such a claim. Thus he will be protected in retaining his fee out of money which he has collected for his client. He will be protected in his claim as attorney on the funds in the hands of a receiver, or in court. This protection, it will be seen from the cases cited, will be afforded in many other cases."

The fact that the compensation of the attorney depends upon the amount of the recovery, or is to be a certain percentage of the recovery, does not give him any greater rights than where the amount of the compensation or the method of compensation is not agreed upon. In either case he has no estate or interest in the subject matter of the agency. His interest where there was such a contract as this, is only a right to share in the proceeds which result from the execution of his authority. It is, therefore, not an agency coupled with an interest.

For these reasons, my opinion is that Dodge & Raymond had no authority to collect the judgment, and that payment to them is not an absolute defense to this action, the plaintiff not having received the money, or any of it, and not having ratified the acts of Dodge & Raymond, as attorneys. It is, therefore, unnecessary to consider the second claim of the plaintiff.

I will add this; it seems to me now, from the proof in this record, that the defendant, the city, in an action upon the judgment would be entitled to credit on that judgment for the share of the amount collected which, under the contract of employment, Dodge & Raymond, were to receive for their services. The whole judgment was paid by the city to Paul Raymond upon the order of Dodge & Raymond. That, of course, includes the share in the judgment of Dodge & Raymond. They would be estopped, both as against the plaintiff and the defendant, from denying that they received their share of the amount collected. Under the circumstances, it seems to me equitable and just that the plaintiff should not be permitted to recover of the defendant more than her share of the judgment, the share of Dodge & Raymond having been paid and satisfied by the defendant.

The verdict in this case will therefore be set aside and a new trial granted.

King & Tracy, for plaintiff.

C. F. Watts, City Solicitor, for defendant.

ACTIONS—RAILWAY BONDS.

[Lucas Common Pleas, Decided July 16, 1894.]

ADELBERT COLLEGE V. TOLEDO, WABASH & WESTERN RY. CO. ET AL.

1. An action brought by one bondholder to enforce an equitable lien based on railroad equipment bonds, alleging that the suit is filed "in his own behalf as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of the suit" is binding only on those who are made or become parties to the suit; the parties who are not named are not parties to the suit and are not bound by the proceedings therein, unless they elect to come in and claim as such, and bear their proportion of the expenses; or unless, after having had notice and an opportunity to come in and make themselves parties, they refuse or neglect to do so.
2. Such a suit does not come under that provision of the chancery practice, now adopted in the codes of many of the states, that when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue for the benefit of all, for, by express averments of the bill, the benefit of the litigation was offered only to such other bondholders as should elect to come in and make themselves parties.
3. The fact that by the final decree the court found the amount due on the entire series of bonds and declared the same a lien, and ordered the property sold, did not change the character of the suit, or affect the bondholders who were not parties, and is not, therefore, *res adjudicata*.
4. Even though it should be held that such suit becomes a class or representative suit by the final decree of the court in which it was brought, although the other bondholders were not brought in, by reversal that decree becomes a nullity and by the subsequent dismissal of the bill only the complainants are bound.
5. Suits brought by individual bondholders in which no relief is sought or obtained in behalf of other bondholders, and in which they were not permitted to become parties, presumably because the suit was an individual one, do not constitute a bar to the subsequent suits of other bondholders of the same class. Such a defense, interposed on the ground that the first or preceding suit was a representative or class suit, is not available where the party whose property is sought to be charged with the payment of the debt allows a suit, individual in form, to proceed, without objection, and without having other bondholders of the same class made parties.
6. An action to enforce a lien upon the property of a consolidated railroad company, based upon an amount alleged to be due on equipment bonds issued by a constituent company, is an action not upon a liability created by statute, nor upon a written agreement, but is solely for equitable relief; and the period of limitation of such actions is ten years, from the date when the cause of action accrued.
7. The cause of action as to each installment accrues when the same matures; the right to enforce the lien as to subsequently accruing installments of interest, or as to the principal of the bonds, cannot be said to have accrued prior to the time when such installments and principal respectively matured.
8. The act of May 1, 1856, (1 S. & C., 327) authorizing a railroad company whose line shall be made to a point in another state to consolidate with the company or companies of "an adjoining state" for the purpose of forming a continuous line for the passage of cars, may as properly be construed to mean the state adjoining the state in which the first company has its line of road as the state adjoining the state in which the first company is incorporated.
9. A railroad company in possession and ownership of property acquired by consolidation, foreclosures and sale, in which the consolidation proceedings were regarded as lawful, is not in a position to question the validity of the consolidation as a defense to an action on equipment bonds issued by a constituent company.
10. A state court has jurisdiction of an action to enforce an equitable lien upon the property of a railroad company commenced prior to foreclosure proceedings in the federal court, when that court no longer has jurisdiction and the rights of the plaintiffs in the state court were not adjudicated in the proceedings in the federal court.—[ED. LEGAL NEWS.]

PUGSLEY, J.

On the first day of November, 1862, the Toledo & Wabash Railway Co. issued and sold its equipment bonds to the amount of \$600,000, payable on May 1, 1883, with interest at seven per cent. per annum, payable on the first day of May and the first day of November in each year as per coupons attached. The plaintiff and the several cross-petitioners are the holders and owners of these bonds to the amount of \$243,500, and they seek in this action to enforce a lien which they claim to have on the property of said company for the payment of said bonds and the unpaid interest thereon.

The Supreme Court held in the case of *Compton v. Railway Co.*, 45 O. S., 592, that under the statute in force in 1865, when the Toledo & Wabash Ry. Co. was consolidated with certain other railroad companies, thereby forming the Toledo, Wabash & Western Railway Co., and under the stipulations contained in the consolidation agreement then executed by the constituent companies, the holders of these equipment bonds acquired a lien upon the property of the Toledo & Wabash Railway Co., and the right to have said property applied to the payment of said bonds and interest. It must be conceded that this decision is conclusive upon this court as to the right of the plaintiff and cross-petitioners to the relief which they ask, unless by reason of certain facts which were not involved in the *Compton* case it is shown that the present defendant, the Wabash Railroad Company, has a good and valid defense.

1. It is contended that the final decree of the U. S. circuit court for the district of Indiana in what is known as the Ham suit (which is pleaded in this case, but was not pleaded in the *Compton* case), is a bar to the prosecution of this action. The history of the Ham suit, so far as it is necessary to state it, is as follows: In July, 1880, in that suit, Benjamin F. Ham and seven other persons filed their amended and supplemental bill of complaint against the Wabash, St. Louis & Pacific Railway Co., and others, alleging that it is filed "in their own behalf, as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of the suit," and alleging the ownership by them of certain of these equipment bonds, and a default in the payment of the interest. The bonds held by complainants amounted to the sum of \$113,500, or less than one-fifth of the entire series. The prayer of the bill is that the court may adjudge and decree that the equipment bonds held by complainants shall be exchangeable for the like amount of the bonds secured by the consolidated mortgage, and that the defendant, the Wabash, St. Louis & Pacific Railway Co. pay to complainants the interest due on their bonds since November 1, 1874; and for all other and proper relief. Such proceedings were had in that suit that in May, 1884, a final decree was rendered, finding the total amount due, both principal and interest, on the entire series of bonds, and finding that said amount is a lien upon all the property which, on the twenty-ninth day of May, 1865, was in the possession of the Toledo & Wabash Railway Co., situated in the states of Ohio and Indiana subject to the liens of four certain mortgages, and ordering the said property to be sold subject to said mortgages; and that the proceeds of the sale, after paying the costs, be brought into court. The defendant, the Wabash, St. Louis & Pacific Railway Co., at once appealed said cause to the Supreme Court of the United States, and in May, 1885, the Supreme Court reversed the said decree, and ordered the cause to be remanded to the circuit court, with directions to disallow the lien claimed by the

holders of the equipment bonds. *Railway Co. v. Ham*, 114 U. S., 587. Subsequently, in May, 1888, the circuit court vacated the said final decree, and disallowed the claim of lien set up in said suit by the holders of equipment bonds, and dismissed the bill for want of equity. (Record of Ham suit, Exhibit P., pages 130, 161, 205, 220, 221 and 232.)

The claim is that the Ham suit was a representative or class suit, and that all holders of the bonds are bound by the final judgment of dismissal. The plaintiff and cross-petitioners in this case were not any of them parties to that suit. None of them came into said suit nor appeared therein, either before or after decree. No pleading or claim setting up the bonds held by them was filed therein, and no notice was given to them by publication or otherwise to join in the prosecution of said action or to share in the fruits of the decree. The action was brought for the benefit of only such bondholders, other than the complainants, as should join in the prosecution of the action and contribute to the expenses thereof.

The rule which is fairly to be derived from the authorities is, that in such an action, the parties who are not named are not parties to the suit, and are not bound by the proceedings therein, unless they elect to come in and claim as such, and bear their proportion of the expenses; or unless, after having had notice and an opportunity to come in and make themselves parties, they refuse or neglect to do so. *Pomeroy's Remedies* (2d ed.) secs. 396 to 399; 2 *Black on Judgments*, sec. 545; *O'Brien v. Browning*, 49 *How. (N. Y.)*, 109; *Story's Equity Pleadings*; sec. 99; *Thonron v. R. R. Co.*, 38 *Fed. Rep.*, 673; *Stevens v. Brooks*, 22 *Wis.*, 672; *Jones v. Lansing*, 7 *Paige*, 583; *Coann v. Atlanta Co.*, 14 *Fed. Rep.*, 4; *Hubbell v. Warren*, 8 *Allen*, 173; *Powell v. Wright*, 7 *Beavan*, 450; No. 48 *Equity Rules U. S. Courts*.

The usual practice in courts of equity, when a decree is rendered in favor of a class represented by the complainant, is to refer the cause to a master to ascertain who the other interested parties are, and to notify them to come in and set up their demands, and then, if they decline to come in, it has been held, they will be excluded from the benefit of the decree. *Johnson v. Watters*, 111 U. S., 640; *Trustees v. Beers*, 2 *Black*, 48; *Story's Equity Pleadings*, sec. 99.

Some authorities were cited by counsel for the defendant which, it is claimed, sustain their position. All have been examined, but only those will be noticed which are principally relied upon.

In *Willoughby v. Chicago Junction Railway Co.*, 50 *N. J. Eq.*, 656, a suit had been brought by a stockholder of a corporation in behalf of himself and all other stockholders, to enjoin the corporation from consummating an agreement made with certain parties. The court held that the agreement was valid, and entered a decree dismissing the bill. Subsequently this suit was brought, by another stockholder, in behalf of himself and all other stockholders, to obtain the same relief. It was held that the decree in the first suit was a bar. The grounds for this decision are, in substance (pages 664 to 667) that the complainant in such a suit does not prosecute it in his own right. He has no standing in court as a party, except on the refusal, either express or implied, of the corporation itself to prosecute. The corporation is the real complainant, and the relief to be obtained is for the benefit of the corporation as such. There must be an unreasonable refusal on the part of the directors of the corporation to prosecute, before a stockholder can begin the action; and when there has been an adjudication at the suit of one stockholder,

which is conclusive upon the corporation, the refusal of the directors to begin another suit for the same relief is not unreasonable, and hence such other suit cannot be brought by another stockholder. The principle of the decision is, that when such an action is brought by a stockholder, whether individually or as a representative of a class, it is maintained directly for the benefit of the corporation, and the final relief when obtained, belongs to the corporation, and not to the stockholder plaintiff. 3 Pomeroy's Eq. Juris., sec. 1095.

A similar principle is involved in the case of *Harmon v. Auditor*, 123 Ill., 122. A bill was filed by the taxpayers of a town in behalf of themselves and the other taxpayers against a railway company and the town, to enjoin the town from issuing its bonds to the company. The court held that the town had power to issue the bonds, and dismissed the bill for want of equity. Subsequently this suit was brought by other taxpayers, praying that the bonds be declared to be null and void, and that the town officers be enjoined from collecting any taxes to pay the same from the property of the complainants and the other taxpayers. It was held that the decree in the first suit was a bar. That decree was conclusive against the town, and every taxpayer, that the bonds were valid. Every taxpayer is a real though not a nominal party to the judgment. The sixth paragraph of the syllabus shows the ground of the decision:

A judgment or decree against a county or township, or its legal representatives, is binding on all the citizens, though not parties to the suit. If the same is for a sum of money, it imposes an obligation against the citizens which they are compelled to discharge, and if for the purpose of its payment, the proper authorities levy and attempt to collect a tax, none of the citizens can, by instituting proceedings to prevent the levy or collection of the tax, dispute the validity of the judgment or relitigate any of the questions which were or could have been litigated in the original action.

Both of these cases proceed upon the ground that the parties bringing the suit represent the corporation, and the relief sought, if obtained, will belong to the corporation and not to themselves. Hence if the relief is denied, the corporation cannot relitigate the same matter in another suit brought by other parties in its behalf to obtain the same relief.

In the *Ham* case the parties bringing the suit did not represent the corporation, and sought for no relief in its behalf.

In the case of *Dewey v. St. Albans Trust Co.*, 60 Vt., 1, there were over 2,400 depositors in a insolvent bank. Of these 1,100 being minors and married women, claimed a preference under the statute. The receiver of a bank filed a petition asking for the direction of the court as to the distribution of the funds. Notice of the hearing on the petition was published for three weeks, and was served on the chairman of the depositors' committee. The receiver and the general creditors and those who claimed a preference were all represented at the hearing. It was decreed that there should be an equal distribution of the funds. From this decree an appeal was taken to the Supreme Court by 12 of the depositors, who claimed a preference. The case was fully argued in that court, and the decree was affirmed. Subsequently, a new petition to obtain the same relief was filed by certain of the depositors who claimed a preference, among whom were some of those who appeared in the first case. The court held that although the general rule is that all

persons interested in the litigation should be before the court, this case is within the exception that where the parties are so numerous as to make it impracticable or greatly inconvenient or expensive, it is sufficient if such number be joined as will fairly represent the interest of all, and that, as both classes of depositors were fairly represented in the litigation, all of them were bound by the decree. In this case the court was asked to make an order for the distribution of a certain fund in the hands of a receiver. The order would necessarily determine the rights of all parties interested in the fund. Notice by publication was given to all persons interested, and it was found that they were all fairly represented by those who appeared at the hearing. Where the question is one of a common or general interest of many persons, and suit is brought by one for the benefit of all without limitation, the court will take care that sufficient persons are before it honestly, fairly and fully, to ascertain and try the general right in contest. Story's Eq. Plead., sec., 120.

The Ham suit was not brought under that provision of the chancery practice now adopted in the codes of many of the states, that when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue for the benefit of all. The complainant did not profess to represent all the bondholders, but by express averments of the bill, the benefit of the litigation was offered only to such other bondholders as should elect to come in and make themselves parties, and share in the expense of the litigation. The fact that by the final decree the court found the amount due on the entire series of bonds, and declared the same a lien, and ordered the property sold, did not change the character of the suit, nor effect the bondholders who were not parties. The proceeds of sale were ordered to be brought into court, but no further steps were taken. The other bondholders were not made parties. They never came in and availed themselves of the benefits of the suit, nor assumed its burdens or liabilities. For these reasons, the first decree of the circuit court was not *res adjudicata* as between them and the defendants, and for the same reason the final judgment of dismissal is not *res adjudicata*.

But even if the suit became a class or representative suit by the final decree, although the other bondholders were not brought in, still the same result will follow. When the final decree was reversed and the cause remanded, the case stood in the circuit court as it did before trial or judgment. By the reversal the final decree became a nullity. Therefore the dismissal of the bill by the circuit court bound only the complainants, none of the other bondholders being parties, the same as if it had been the first and only judgment in the case. It is believed that none of the cases cited by defendant sustain a contrary conclusion.

2. It is contended that the decree in the Compton case is a bar to the prosecution of this action, and that the only remedy which the plaintiff and cross-petitioners have is under that decree, on the ground that the Compton suit is a class or representative suit.

The petition in the Compton case, which was filed in this court on February 3, 1880, sets out the bonds owned by Compton, and prays that the defendant, The Wabash, St Louis & Pacific Ry. Co. be decreed to pay the amount due to the plaintiff upon the said bonds which he holds and owns, and, in default thereof, that the property originally owned by the Toledo & Wabash Railway Co. be decreed to be sold for the payment of said bonds owned by said plaintiff (Record of Compton

Adelbert College v. Railway Co. et al.

suit, "Exhibit M." pages 2, 47, and 48). In March, 1882, a final decree was rendered by this court in favor of Compton, from which an appeal was taken to the district court. While the case was pending in the district court, The Adelbert College, the plaintiff in this action, filed a motion for leave to be made a defendant, and to file answer therein, which motion was overruled. (Exhibit M., pages 131 and 133). The cause was reserved to the Supreme Court for decision, and at its January term, 1888, the Supreme Court rendered a final decree in favor of Compton, and remanded the cause to this court to carry the decree into execution. By such final decree the court found the amount due to the plaintiff Compton upon the bonds owned by him for principal and interest on the first day of May, 1888, to be the sum of \$339,920.40, and ordered "that the said defendants or any of them (Exhibit M, page 236) pay to said plaintiff the said sum of \$339,920.40 now due on said bonds owned by the plaintiff as aforesaid, with interest thereon to the day of payment to the plaintiff, within ten days from the entry of this decree; and if default shall be made in such payment, then an order of sale issue for the sale as upon execution at law of all said railroad and real property, together with the structures thereon, and the fixtures and appurtenances thereunto appertaining, upon which the lien of said bonds, known as equipment bonds, is hereby declared to exist, which is situate in the state of Ohio and the jurisdiction of this court, subject however, and subject only, to the liens of the two mortgages hereinbefore mentioned as executed by the Toledo & Illinois Railroad Co. to the Farmers' Loan & Trust Co., and the Toledo & Wabash Railroad Co. to Edwin D. Morgan, and to the indebtedness secured by each of said mortgages; and that from the proceeds of such sale the costs of this action as taxed be paid, and the residue of such proceeds be brought into court to abide the further order herein on the footing of this decree."

After said cause had been remanded to this court, and on the sixth day of June, 1888, a motion was filed therein to make William F. Redmond and four other persons (who are bondholders and cross-petitioners in this action) parties defendant, with leave to answer, which motion was overruled on December 31, 1888. (Common Pleas Journal 78, page 17.) On the twenty-seventh day of October, 1888, said Compton was made a party defendant in the consolidated cause of James R. Jesup et al. v. The Wabash, St. Louis & Pacific Railway Co. et al., then pending in the circuit court of the United States for the northern district of Ohio, and ordered to appear therein and set up his lien. On March 28, 1889, he filed his answer in said consolidated cause, contesting the jurisdiction of the court, and setting up the decree in his favor of the Supreme Court of Ohio. Such proceedings were had in said cause that, on the twenty-first day of July, 1892, a decree was rendered, finding that the decree of the Supreme Court of Ohio is a conclusive adjudication as to the amount, validity, and priority of said Compton's lien upon the property of The Toledo & Wabash Railway Co., and that said Compton is entitled to redeem the said property from certain prior mortgage liens thereon, amounting to the sum of \$8,540,058.09, and ordering among other things, that if said Compton shall fail to redeem the said property within the time and upon the terms provided, he shall be taxed with all the costs of the proceedings had in and about his claim; and in default of payment of said costs, execution shall issue therefor. Compton appealed from said decree to the United States circuit court of appeals

for the sixth circuit, where said cause is now pending. (Exhibit T, pages 149, 168 and 271.)

The question to be determined is, whether the Compton suit was a representative or class suit, and if it was, whether the final decree in that suit is a bar to this action. Both the district court and this court refused to allow the bondholders in this action to intervene in the Compton suit, presumably upon the ground that it was an individual suit. The refusal of the courts to grant to these bondholders any remedy in the Compton case, is, it seems sufficient reason why they should be permitted to maintain an independent suit; but assuming that they might properly have been made parties to the Compton case, or that upon the distribution of the proceeds of any sale made under the Compton decree they ought to be allowed to intervene upon terms or otherwise, is there any valid objection to this suit? In other words, is the Compton decree itself a bar to this suit? The pleadings and decree in the Compton suit show that in form it was an individual suit only. No relief was sought nor obtained in behalf of other bondholders. Compton was in sole control of the case, and might have dismissed it any time before decree and after decree as the case now stands, if the amount found due him is paid or his claim is discharged, no order of sale can issue. Under such circumstances, to hold that the Compton decree is itself a bar to this action would practically be a denial of all remedy to these bondholders. They have not as yet been able to come into the Compton suit. They may never be able to come into it. They ought at least to be allowed to have such an adjudication as will preserve their rights, whatever they may be.

It is said that Compton, as an individual bondholder, cannot enforce his rights under the lien separate and distinct from the rights of all the other bondholders secured by the same lien, and belonging to the same class. This may be true, but the defendants in that case made no claim that other bondholders should be brought in. They without objection, allowed the case to proceed as the individual suit of Compton, and all which Compton obtained was a decree finding the amount due to him on his bonds, and ordering a sale. The proceeds of sale are to be brought into court for distribution. It is yet to be determined, in case a sale is made, how the proceeds are to be distributed.

Cases are cited which hold that when a single bondholder brings suit to foreclose a mortgage that has been given to a trustee to secure payment of a large number of bonds, his action is for the benefit of all the bondholders. There the trustee represents all the bondholders in all matters of litigation respecting their common rights, and should bring the suit. The bondholder is allowed to bring suit for the enforcement of the mortgage, only in case the trustee improperly refuses or neglects to sue; and in such case he should make the trustee a defendant, and the other bondholders may come in and prove before the master, without making themselves parties, and may not therefore bring a separate action. Here, there was no trustee. Compton represented and claimed to represent only the bonds owned by himself. He was not prohibited by the principle of these cases from bringing a separate action, and he was allowed to do so without objection by the owners of the property sought to be charged with the payment of his debt.

Other cases are cited which hold that one bondholder cannot, by bringing an action at law upon his bonds, and obtaining judgment and levying execution, obtain a preference over other bondholders. It is

submitted that these cases are not controlling, because if such is the object or effect of the Compton suit, the objection should be made there and not here. If Compton wrongfully claims a preference under his decree, that is no answer to the claim of these bondholders to the relief to which they are entitled.

They do not claim a preference over Compton and do not admit that the Compton decree gives him a preference over them. Their rights are not fixed by the Compton decree, and they have not been allowed to come in under that decree, and set up their rights. My conclusion is that the Compton decree is not a bar to the maintenance of this action.

3. It is contended that the rights of the plaintiff and cross-petitioners are barred by the statute of limitations. Default occurred in the payment of the semi-annual interest coupons which fell due on May 1, 1875, and no interest has since been paid. The bonds became due on May 1, 1883, and are wholly unpaid. The petition in this case was filed April 28, 1883, and the summons, issued on the same day, was served on the Wabash, St. Louis & Pacific Railway Co. on May 5, 1883. The plaintiff claimed as owner of two of the bonds of \$500 each, and sought no relief in behalf of any other bondholder. On January 5, 1889, the cross-petitioners having been made defendants by leave of court, filed their answer and cross-petition, setting up the bonds owned by them, and asking for relief in their own behalf, and in behalf of all bondholders who may appear and unite in the action and contribute to the expenses thereof. Notice to answer said cross-petition was duly published for a large number of defendants, the first publication being on January 9, 1889; and afterwards notice to answer said cross-petition was duly published for the remaining defendants, the first publication being on April 17, 1889. These defendants so notified included all the corporations and individuals who were then interested in the railroad property as owners or otherwise.

The question to be determined is, whether this action is upon an agreement in writing, and so is barred in fifteen years under sec. 4980, Rev. Stat., or is upon a liability created by statute, and so is barred in six years, under sec. 4981, Rev. Stat., or is an action for relief, under sec. 4985, Rev. Stat., and so is barred in ten years. The right of the bondholders to a lien is placed by the Supreme Court upon two grounds: first, upon the ground that a lien results from the liability imposed by the statute upon the consolidated company to pay the debts of the constituent companies; and, second, independently of the statute, upon the stipulation of the consolidated agreement that the bonds should be protected by the new company; the principle being that when property is transferred upon condition that the transferee shall pay some third person a debt, the latter acquires an equitable lien on the property to the extent of the debt to be paid. If this was an action at law against the consolidated company to recover a personal judgment, it might well be claimed that it was both an action upon a liability created by statute and an action upon a written agreement. But it is not such an action. It is an action solely to enforce an equitable lien upon property in possession of the successors of the consolidated company. An equitable lien for the payment of the bonds was acquired when the consolidated agreement was made, but it could not be enforced until there was a default in the payment of the bonds. The cause of action accrued when the default occurred. While the question is not free from difficulty, I am of the opinion that the action is not upon a liability created by statute, nor

upon a written agreement, but is solely for equitable relief, and the rule is, that the period of limitation applicable to an action for equitable relief is ten years, when the statute does not specially provide any other limitation. "An action for relief not hereinbefore provided for can only be brought within ten years after the cause of action accrues," sec. 4985, Rev. Stat. It is an action for relief, and it is "not hereinbefore provided for." The cases in which the limitations of ten years under sec. 4985, Rev. Stat., has been applied seem to sustain this view.

In *Neal v. Nash*, 23 Ohio St., 483, a surety in a judgment against him and his principal paid the judgment to the creditor, with the agreement that it should remain in force and be assigned to him; and having procured the assignment of the judgment, he brought an action to be subrogated to the rights of the creditor in the judgment. It was held that the statutory period of limitation applicable in such an action—it being for equitable relief only—is ten years.

In *Neilson v. Fry*, 16 Ohio St., 558, it is said that an action for equitable relief is limited to ten years.

In *Hawkins v. Lasley*, 40 Ohio St., 37, an action was brought under the statute to charge the individual property of the partners with the payment of a judgment against the partnership. It was held that it was not an action upon a liability, created by statute, but was an action for relief "not hereinbefore provided for," and was barred in ten years.

In *Gray v. Kerr*, 46 Ohio St., 652, it is held that the cause of action in favor of one partner against his co-partner for an account accrues upon the dissolution of the partnership, and that such an action is governed by sec. 4985, Rev. Stat., and can only be brought within ten years after the cause of action accrues.

In *Bryant v. Swetland*, 48 Ohio St., 194, it is held that an action to reform a written instrument on the ground of mistake comes within the class provided for by sec. 4985, Rev. Stat., which limits the time within which the same may be commenced to ten years after the cause of action accrues.

In *Swan v. Shahan*, 1 Circ. Dec., 119, it is held that an action to enforce specific performance of a verbal contract for the transfer of real and personal property is for equitable relief, and properly comes within sec. 4985, Rev. Stat.

It is claimed that the right to enforce the equitable lien accrued as to the entire indebtedness on the first day of May, 1875, the date of the first default in the payment of interest, and that if the ten years' statute is applicable, such right was lost as to the whole indebtedness on the first day of May, 1885. No authorities were cited to support this claim, and I am unable to see on what principle the right to enforce the lien as to subsequently accruing installments of interest, or as to the principal of the bonds, can be said to have accrued prior to the time when such installments and principal respectively matured. The cause of action as to each installment accrued when the same matured, and was barred in ten years thereafter. Under this holding, the eight semi-annual coupons which matured prior to May 1, 1879, on each of the bonds held by the cross-petitioners, must be excluded from any recovery in this action.

4. It is contended that the consolidation agreement of 1865, under which the lien of the equipment bonds is claimed, was unauthorized by law, and that this question was not raised in the *Compton* case. The consolidation was effected under the statute of 1856 between the Toledo & Wabash Railway Co., which issued the bonds, and three railroad com

panies of Illinois, thereby forming The Toledo, Wabash & Western Railway Co. The Toledo & Wabash Railway Co. was itself a consolidated company, formed in 1858 under the same statute, by a consolidation of the Toledo & Wabash Railroad Co., an Ohio corporation, and The Wabash & Western Railway Co., an Indiana corporation, thereby acquiring a continuous line of Railroad from Toledo to the west line of the state of Indiana. The statute referred to is the Act of May 1, 1856. 1 S. & C., 327. Section 1 is as follows:

It shall be lawful for any railroad company in this state, organized under the general or any special law, or which may hereafter be organized in this state, and whose line of road shall be made or in the process of construction, to the boundary line of the state, or to any point either in or out of this state, to consolidate its capital stock with the capital stock of any railroad in an adjoining state, the line of whose road has been made or is in the process of construction to the same point, and when the several roads so unite as to form a continuous line for the passage of cars.

It is claimed that the Illinois companies were not "in an adjoining state;" that is, they were not in a state adjoining the state of Ohio, and that therefore the consolidation of 1865 was illegal. The line of Road of The Toledo & Wabash Railway Co., which was formed by consolidation under this statute, extended to "a point out of this state," namely, to a point in the state of Indiana, or to the boundary line between the states of Indiana and Illinois. The Toledo & Wabash Railway Co. was therefore a railroad company in this state, whose line of road was, partly in the state of Indiana, and the Illinois companies were railroad companies in the state of Illinois, a state adjoining the state of Indiana. Manifestly the object of the statute was to authorize the consolidation of railroad companies whose roads form a continuous line for the passage of cars, and to accomplish that object, the words, "adjoining state" may as properly be construed to mean the state adjoining the state in which the first company has its line of road as the state adjoining the state in which the first company is incorporated. I see no reason why the consolidation of 1865 was not a consolidation of a railroad company in this state, having a line of road in the state of Indiana, with a railroad company in an adjoining state.

This question as to the validity of the consolidation seems to be raised now for the first time, although the matter of these equipment bonds has been before the courts, both federal and state, in numerous and various forms since 1878. And the claim that the consolidation was illegal nowhere appears in this case, except in the argument of counsel. The answer of The Wabash Railroad Co. (printed record, page 236) admits that on or about the twenty-ninth day of May, 1865, the said Toledo & Wabash Railway Co. entered into an agreement of consolidation with the three Illinois railroad companies (naming them) forming by such consolidation a new company, known as The Toledo, Wabash & Western Railway Co. And it admits that said agreement for consolidation was consummated on or about the date named in said petition, but denies the effect claimed from said agreement of consolidation; that is, it denies that a lien was thereby created for the payment of the bonds. In the agreed statement of facts (paragraph 18, page 7), it is agreed that on or about the twenty-ninth day of May, 1865, The Toledo & Wabash Railway Co. and the three Illinois railroad companies (naming them) entered into articles of consolidation, and thereby formed the Toledo,

Wabash & Western Railway Co. A copy of the articles of consolidation is attached. These were duly executed and filed, and recite a compliance with the laws of the several states of Ohio, Indiana and Illinois. Nowhere in the record is it intimated that The Toledo, Wabash & Western Railway Co. was not a corporation duly formed by consolidation under the Ohio statute. If the question as to the validity of the consolidation is properly raised upon the record in this case, it might properly have been raised upon the record in the Compton case, because in this respect the records in the two cases are alike. Whether or not the Supreme Court considered the question in the Compton case we do not know, but we do know that the court in its opinion treated the consolidation as legal and valid. Under such circumstances, this court would not hold the consolidation to be illegal, unless clearly convinced of its illegality. It may be added that the consolidation proceedings were treated as valid by the consolidated company and all its successors. It took all the property of the constituent companies, and managed and operated the consolidated railroad for a period of years. It executed mortgages upon the same, incurred obligations, and exercised all the powers of a corporation, without question. It was itself consolidated with other railroad companies, and through such consolidation and subsequent sales and consolidations, the ownership and possession of the property in question have devolved upon the present Wabash Railroad Co., defendant in this case. It was at least a corporation *de facto*, entitled to all the rights and chargeable with all the liabilities of such a corporation. It recognized its liability upon the equipment bonds by regularly paying the interest thereon as it fell due for a period of nine years, until it became insolvent in 1874; and the various foreclosures, sales, and consolidations which have since taken place in the Wabash railroad system can only be sustained on the theory that the consolidation of 1865 was valid. The final decree in the consolidated cause of Jesup and others, under which the defendant claims title to the property, expressly found that the consolidation was lawfully effected.

In view of these considerations, it is submitted that the defendant is not now in a position to question its validity.

5. It is contended that under the facts in this case the federal courts of Ohio and Indiana had exclusive jurisdiction to ascertain and determine the liens upon the property, and order its sale, and that this court is now without jurisdiction. This claim has reference to the various suits and foreclosure proceedings in the federal courts begun on the twenty-seventh day of May, 1884, and terminated by the final decree in the consolidated cause of James R. Jesup et al. v. The Wabash, St. Louis & Pacific Railway Co. et al., rendered on March 23, 1889, and by the sale and delivery of the possession of the property to the purchasing committee on July 1, 1889.

The defendant, the Wabash Railroad Co., became incorporated on August 1, 1889, and by a conveyance from the purchasers, acquired and now holds the title to the property, and stands in the shoes of said purchasers—and in this case contests the jurisdiction of this court. The authorities relied upon to support the claim of want of jurisdiction apply the familiar rule that the court which first takes cognizance of a controversy is entitled to retain jurisdiction to the end of the litigation, and to take possession and control of the subject matter of the investigation, to the exclusion of all interference by other courts of co-ordinate jurisdiction. There is no doubt as to the rule, but does it apply to

the facts of this case? This action was begun on April 28, 1883, before the commencement of any of the said proceedings in the federal courts, and has remained pending in this court ever since. During the pendency of those proceedings, no attempt was made by any of the parties to this action to interrupt or interfere with the possession of the receivers appointed by the federal courts. Neither the plaintiff nor any of the cross-petitioners, nor any one representing them, was a party to those proceedings, and their rights were in no manner adjudicated therein. The said purchasers at the foreclosure sale, and their predecessors in title, were parties to this action, and appeared therein prior to said sale, and all had knowledge at and prior thereto of the specific demands and claims which the plaintiff and cross-petitioners assert in this action. Those proceedings are ended. The receivers are discharged, and the property is now in the possession of its owner, and has been since August, 1889; and the owner, The Wabash Railroad Co., is a party to this action. Certainly the federal courts now have no jurisdiction over the subject-matter of this suit, and why may not the plaintiff and cross-petitioners enforce their lien, which the Supreme Court held is available against all persons deriving title from the consolidated company of 1865? 45 O. S., 593. It is believed that none of the authorities cited hold that this may not be done. On the contrary, in one of these cases this precise question arose, and was decided in favor of the right. I refer to the case of *Factors Co. v. Murphy*, 111 U. S., 738, which was on error to the Supreme Court of Louisiana. The property of a bankrupt covered by a mortgage was sold under an order of the district court of the United States in bankruptcy, the order being to sell the bankrupt's property free from incumbrances. The mortgagee was not a party to the bankruptcy proceeding, and subsequently brought an action in the state court to foreclose his mortgage. It was held that the sale of real estate of a bankrupt by order of the United States court, free from the lien of a mortgage, is invalid as to the creditor, and as to the purpose of discharging the lien, unless he is made a party to the proceeding; and that the mortgagee had the right to a decree of foreclosure. But it is claimed that the sale of the property by the state court, even after the relinquishment of possession by the federal court, will give no title to the purchaser thereunder as against the holder of the title under the proceedings had in the federal court; and the case is cited of *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S., 294. That case was an action of ejectment brought by a purchaser at a sheriff's sale under a decree of a state court, enforcing a mechanic's lien, against a purchaser at a marshal's sale under a decree of the United States court rendered in proceeding for a violation of the internal revenue laws. It was a controversy over the title. The premises were first seized by the officers of the United States, and while they were in the possession and custody of the marshal, proceedings in the state court were begun and prosecuted to judgment. The premises were sold under a decree of the United States court; and possession thereof delivered to the purchaser. Afterwards they were sold by the sheriff under the judgment of the state court. It was held that when proceedings in rem are commenced in a state court, and analogous proceedings in rem in a United States court against the same property, exclusive jurisdiction for the purpose of its own suit is acquired by the court which first takes possession of the res, and the acts of the other court in assuming to proceed to judgment and to dispose of the property convey no title. Although the sale under the state court was judgment

not made until the property had passed from the possession of the United States district court, yet, the initial step on which the sheriff's proceedings depended—the commencement of the proceedings to enforce the mechanic's lien, asserting the jurisdiction and control of the state court over the property sold, took place when the property was in the exclusive custody and control of the district court. It was not decided whether the law applicable to the internal revenue proceedings authorized an absolute forfeiture of the res, including all interest and estates in it, so as to overreach antecedent liens, and adverse claims, or only of the actual interest of the owner charged with the violations of law at the time of the alleged offenses. If there was an absolute forfeiture, the purchaser under the decree of the United States court obtained a good title, as that court first acquired jurisdiction. If there was a forfeiture of only the interest of the owner, the purchaser at the sale under the state court judgment acquired no title which he could assert in an action of ejectment against the purchaser under the federal decree, because the state court proceedings were begun while property was in the exclusive jurisdiction of the federal court, and the purchaser under the federal decree was not a party to said proceedings.

The case is distinguishable from the case at bar. Here the state court first acquired jurisdiction. This is certainly true as to the bonds owned by the plaintiff, and although the cross-petition was not filed until after the proceedings in the federal courts had been commenced, yet no adverse action was taken by the state court while those proceedings were pending, and neither the plaintiff nor cross-petitioners were parties to those proceedings; and furthermore the purchaser at the foreclosure sale and the lienholders were all parties to the suit in the state court before the property passed out of the jurisdiction and control of the federal court. Under these circumstances, as the rights of the plaintiff and cross-petitioners were not adjudicated in the federal court, and that court no longer has jurisdiction, there seems to be no valid objection to the power of this court to proceed and hear and determine the matters in issue.

6. It is contended that the sole right of the plaintiff and cross-petitioners is the right to redeem, and that this redemption must be of the entire property in Ohio and Indiana covered by their lien, from the four mortgages thereon, which are conceded to be prior liens. Under this head many important and interesting questions were presented and ably discussed by counsel, with numerous citations of authorities. In the view which I take of the case, it is not necessary to consider these questions. So far as this branch of the case is concerned, the situation is not materially different from what it was when the decree of the Supreme Court of Ohio was rendered in the Compton case. It is true that the proceedings in the consolidated cause for the foreclosure of the mortgages and the sale of the property have since been taken; but as already shown, the plaintiff and cross-petitioners were not parties to those proceedings and are not bound thereby. If in 1888 Compton was entitled, as the Supreme Court found and decided, to an order for the sale of the property, the plaintiff and cross-petitioners are entitled to the same order now.

Having disposed of all of the matters of defense not set up nor involved in the Compton case, and having found that none of these matters constitute a defense, it is the duty of the court to render the same decree which was rendered in the Compton case, and this is accordingly done.

Adelbert College v. Railway Co. et al.

A decree may be taken in favor of the plaintiff and cross-petitioners in accordance with this opinion, finding the amount due on the bonds, and declaring the same a lien, and ordering a sale, in all respects as was found and ordered in the Compton case.

Hon. George Hoadly and R. R. Kindade, for plaintiff and cross-petitioners.

Rush Taggart, Henry Crawford and A. L. Smith, for The Wabash Railroad Co.

DOW TAX.

[Lucas County Common Pleas, April Term, 1892.]

*JAMES STEVENSON V. SAMUEL A. HUNTER, TREAS.

1. In an action to recover back money paid to the county treasurer as an assessment upon the business of trafficking in intoxicating liquors under the "Dow Law," the tax duplicate is prima facie evidence of every fact which is necessary to authorize the assessment, including the fact that the plaintiff was engaged in the business of trafficking in intoxicating liquors.
2. An assessment can be lawfully made under the "Dow Law" upon the business of trafficking in intoxicating liquors in a township which has voted against the sale of intoxicating liquors under the "Township Local Option Act" of March 3, 1888.

PUGSLEY, J.

This is an action of replevin that was tried to the court, a jury being waived. The undisputed facts are as follows: On the fifth day of May, 1888, a special election was held in Providence township, in this county, under the provisions of the act passed March 3, 1888, commonly known as the "Township Local Option Act." A majority of the votes cast at said election were against the sale of intoxicating liquors, whereby it became unlawful for any person within that township to sell any intoxicating liquors to be used as a beverage, or to keep a place where such liquors are sold. On the first of October, 1891, and before any other election under the act was held in Providence township, the auditor of the county received information that the plaintiff, James Stevenson, was engaged in such township in the business of trafficking in intoxicating liquors, and thereupon the auditor entered upon the duplicate the assessment against such business provided for by the act of May 14, 1886, known as the "Dow Law." The plaintiff was charged on the duplicate with having begun the business upon the twenty-fifth day of May or the fourth Monday of May, 1891, and the amount of the assessment was the full sum of \$250. A few days thereafter, and on or about the sixth of October, the defendant, Samuel A. Hunter, who is the treasurer of the county, proceeded to collect the assessment, and was about to levy upon the goods and chattels of the plaintiff, under sec. 4 of the Dow Law, when this arrangement was made between them; the plaintiff signed a written statement in the form of an affidavit prepared by the auditor, reciting that from the twenty-fifth of May, continuously to the first of October, 1891, he was engaged in the business in trafficking in intoxicating liquors, and that on the first of October he discontinued such business; and thereupon there was abated from the assessment the rata-

*Affirmed by circuit court.

ble proportion for the unexpired part of the year after October 1st, leaving a balance claimed to be due upon the assessment, with penalties, of \$117.44. On the same day the plaintiff deposited with the defendant the sum of \$113 in coin and currency, and took a receipt which recites that this sum is received by the defendant as a special deposit "on account of the plaintiff's liquor tax and penalty." The money was deposited with the defendant to prevent the levy proposed to be made by the treasurer, and secure the payment of the assessment. It was agreed between the parties that the plaintiff would take legal advice, and if he decided to contest the assessment he would notify the defendant, and take such legal measures as should be deemed advisable to obtain a return of the money. It is proper to say that while the plaintiff in conversation with the officer admitted that he had sold cider and native wine and sweet wine, he denied in such conversation that he had sold intoxicating liquors. The plaintiff took legal advice, and, acting upon that, he demanded of the defendant a return of the money, and this being refused, he brought this action of replevin before a justice of the peace, and from the judgment of the justice an appeal was taken to this court. The money was not taken from the defendant, and the action proceeded under the statute as one for the recovery of damages.

The petition alleges that the plaintiff is the owner and entitled to the immediate possession of this money, specifically describing it, and that it is wrongfully detained from him by the defendant. The prayer of the petition is, that the plaintiff may have judgment for the delivery of the money, and in default of said delivery, that he may have judgment for the sum of \$113 and interest. The answer is a general denial.

The question involved is as to the legality of the assessment, and is the same as it would be if the plaintiff had paid the money to the defendant, as treasurer, under protest, and to prevent the seizure of his goods, and had then brought an action to recover the money back. In such an action to recover the money, it would be incumbent upon the plaintiff to show that the assessment was illegal. So in this action the burden is on the plaintiff to establish the allegations of his petition, viz.: that he is the owner and entitled to the immediate possession of the money, and that it is wrongfully detained from his possession by the defendant. The money was voluntarily deposited with the defendant to pay or to secure the payment of the assessment. Under the arrangement which was made between the parties, the defendant is lawfully in possession of the money until it is shown that the treasurer has no right to appropriate the money to the payment of this assessment. The burden is therefore upon the plaintiff to show the illegality of the assessment. This becomes material principally with reference to the question of fact as to whether the plaintiff, between May and October, 1891, was actually engaged in the business of trafficking in intoxicating liquors. If he shows that he was not so engaged, then the legal presumption in favor of the validity of the assessment is overcome by that fact alone, and in that case the assessment should be held to be unauthorized. Upon the trial of this case the plaintiff offered no evidence upon this subject; although he was present in court, and although the fact was within his knowledge, he was not called as a witness. The defendant offered in evidence the duplicate and the admissions and the affidavit of the plaintiff already referred to, and this was all the evidence upon the subject. The law makes the duplicate *prima facie* evidence of every fact which is necessary to authorize the assess-

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ment including the fact that the plaintiff was engaged in the business of trafficking in intoxicating liquors; and in the absence of any denial on the part of the plaintiff that he was engaged in the business, and in the absence of any evidence tending to show that he was not so engaged, the effect which the law gives to the official action of the auditor in making the assessment must prevail. The question of fact referred to, therefore, must be decided against the plaintiff.

The important question, and the one about which there is the most serious contention, is whether the Dow tax can be lawfully assessed upon the business of trafficking in intoxicating liquors in a township which has voted against the sale of intoxicating liquors under the Local Option Act. It is contended on the part of the plaintiff that the right to tax the business ceased when, by the action of the voters of the township, the business became unlawful; that the only penalty to which the person carrying on the business is subject is that of fine and imprisonment; that the payment of the tax does not exempt him from the penalty, or protect him in carrying on the business, and that taxation without protection is unauthorized, and cannot be sustained. On the other hand it is contended in behalf of the defendant that by the Dow law, an assessment is required to be made in all cases upon the business of trafficking in intoxicating liquors, and the assessment must be paid by every person engaged in such a business; that this absolute requirement is not in any way qualified by the local option law; that the idea of protection to the business is not involved in the taxation of the liquor traffic, and that one engaged in the traffic cannot plead a violation of the law, or his own wrong, to excuse him from paying the tax.

By the Dow law, every person engaged in the business of trafficking in intoxicating liquors is required to pay annually a tax upon the business. A person who carries on the business in violation of the law is not excepted. The sole fact that the business is carried on authorizes the levying of the tax, and there is no provision of the local option law which exempts any dealer from the payment of the tax. But the claim is that the state has no power to tax a prohibited business, and that therefore it must be presumed that the business of selling liquors when prohibited is not included within the provisions of the Dow law, and that the law should be construed as if the prohibited business was expressly excepted. The argument against the existence of the power to tax an illegal business is, that when a business is taxed, some idea as to a protection to that business is necessarily involved—in other words, that taxation and protection are reciprocal; and inasmuch as the payment of the tax does not legalize the business nor relieve the dealer from the penalty imposed for a violation of the law, that the tax cannot be sustained. At first blush there seems to be some force in this argument, and it may be that there are occupations, or trades, or kinds of business which are so pernicious or contrary to good morals, or so detrimental to the best interests of the community, that the state ought not to even appear to countenance their existence by taxing them; and this may be true even in cases where the business is not prohibited by law; but the notion that the liquor traffic is sanctioned by taxing it disappears at once, when it is considered that in this state the tax is imposed, and can only be sustained under the constitution, because it is a means of providing against the evils resulting from the traffic. No idea of protection is involved. The state, finding the traffic in existence, and disapproving it, taxes it, both for revenue and

to diminish the evils resulting from it. And the evils resulting from carrying on the traffic when it is prohibited are certainly as great and as necessary to be provided against as when the traffic is unrestrained. The idea that protection is due to the business because of the tax can have no place in the law. If this were so, the law would be in contravention of the no-license clause of the constitution. Where there is no prohibition, the dealer is allowed to carry on the business, not because he pays the tax, but because the state has not exercised its right to prohibit the business; and if the tax is not paid, the business is not thereby rendered unlawful; the tax may be collected the same as other personal taxes; that is all. In no sense, therefore, can the business be said to be protected by the payment of the tax. The penalty imposed for carrying on the business when prohibited is simply punishment. To say that a person who engages in an illegal business may be fined and imprisoned, although he pays the tax, is simply to say that he may be punished for violating the law, which is just, and gives him no ground of complaint. He cannot be heard to say that because he has violated the law and may be punished therefor, he ought not to pay the tax.

This subject was very fully considered by the Supreme Court of Michigan in the case of *Youngblood v. Sexton*, 32 Mich., 406. That was a case which involved the validity of a law of Michigan providing for the taxation of the liquor traffic. The gist of the decision upon this point is contained in this paragraph of the syllabus:

"A business is not necessarily licensed or protected because of its being taxed; nor does taxing a business imply an approval of it. On the contrary, it is competent to tax an illegal business, and a tax on a business not prohibited is often, where police purposes are had in view, a means of expressing disapproval of it."

There is a very full discussion of this branch of the case in the opinion of the court, which was delivered by Judge Cooley, and his reasoning seems to me to answer all the objections that are urged to the right to tax the liquor traffic in a township where the traffic is prohibited by law.

It was held by the Supreme Court of the United States in the "License Tax Case," 5 Wal., 462, that the congress may lawfully impose special taxes upon the business of dealing in liquors, and enforce the payment of the tax by suitable penalties, although the business is prohibited by the laws of the state where the business is carried on. And it was further held that the payment of such a special tax confers no authority to carry on the business. The court say:

"There is nothing hostile or contradictory in the acts of congress to the legislation of the states. What the latter prohibits, the former, if the business is found in existence notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction and tend to the same result. It would be a judicial anomaly as singular as indefensible, if we should hold a violation of the laws of the state to be a justification for the violation of the laws of the Union."

The principle of that decision is applicable to the case at bar. The Dow law subjects every person carrying on the business of trafficking in intoxicating liquors to a special tax. The local option law prohibits the carrying on of the business in a township which has voted against it. There is no inconsistency between those two laws. If, notwithstanding the prohibition, the business is carried on, it would be an anom-

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ally to hold that a violation of the law relieves from the payment of the tax. The result would be that those who are lawfully engaged in carrying on the business must pay the tax, while those who carry on the business in violation of the law are exempt. This would be putting a premium on disobedience to the law. It is no answer to this to say that the person who violates the law by carrying on the prohibited business may be punished by a fine and imprisonment. The tax is imposed not to punish him, nor, on the other hand, in consideration of any protection due to the business. The business is not protected, but his property and the fruits of his business are protected, and in consideration of this, the general benefits of government, he should pay the tax the same as all law-abiding citizens.

By sec. 4 of the local option act it is provided that if a dealer in intoxicating liquors who has paid the Dow tax shall discontinue the business by reason of the vote, a ratable part of the tax for the unexpired portion of the year shall be refunded to him. The tax is not to be refunded unless the business is discontinued. It is lawful, therefore, to retain the tax so long as the business is carried on, although the business is prohibited by law, and although the person carrying on the business is subject to fine and imprisonment. It is true that in the case stated the business is lawful when the tax is levied and paid; but if the state may justly and legally retain the tax without affording any protection to the business, it would seem to be equally lawful and just to levy the tax without such protection. In the one case the dealer may secure the return of the tax, by obeying the law and discontinuing the business: in the other case, he may avoid the imposition of the tax by obeying the law and abstaining from the business. In neither case could the dealer complain of any hardship because of the tax.

Judgment in this case therefore, will be rendered for the defendant.

J. W. Ritchie, for plaintiff.

J. A. Barber, Pros. Atty., for defendant.

(The foregoing judgment was affirmed by the circuit court for the sixth circuit.)

SERVICE OF SUMMONS.

[Mayor's Court of Portsmouth, Ohio.]

David L. Williams v. Chesapeake & Ohio R. R. Co.

Service in a magistrate's court on a railroad. Where the railroad enters his jurisdiction by a ferry boat only, service on a ticket agent located in his township, held to be in compliance with section 6748, Revised Statutes.

HALL, Mayor.

This was an action to recover damages for baggage missent and withheld from plaintiff for a week. Plaintiff was a commercial traveler residing in Portsmouth, O., and traveling for the firm of Russell, Vincent & Williams, shoe manufacturers. Plaintiff bought a ticket from S. Manchester, Ky., to Ripley, O., on November 28, 1893, and had his sample trunk checked to Ripley, Ohio. By mistake of the railroad agent, the trunk was checked to Cincinnati, O., and plaintiff did not recover it for a week, and his trip was broken up and he had to go home. He sued

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for \$182.50 damages. The Chesapeake & Ohio Railroad is operated from Cincinnati, O., to Newport News, Va., through Kentucky, West Virginia and Virginia. The track and roadbed of this railroad does not enter Ohio except at Cincinnati, Ohio. It maintains a ticket and freight office in Portsmouth, O., and takes passengers and freight from Portsmouth, O., to any point on its line to Portsmouth, O., but it does it by means of a steamboat, crossing and re-crossing the Ohio river to and from all its trains. This steamboat or steam ferry boat is owned and operated by the Railroad Company, and licensed by the city of Portsmouth as a railroad ferry—and used for the purpose of transferring its freights and passengers to and from Portsmouth to its depot at South Portsmouth, Ky. The railroad is a corporation under the laws of Virginia and West Virginia.

The plaintiff had the summons served on the ticket agent of the Chesapeake & Ohio Railroad, at its office in Portsmouth, under section 6478, Revised Statutes. The Railroad Company moved to set aside the service because its road was not located into or through the city of Portsmouth, or Wayne township, which is co-extensive with the city. The facts were admitted, and upon them the railroad claimed its road was not within the jurisdiction of the mayor's court. The cause was fully argued, and the mayor held that the railroad was located into the city of Portsmouth. That by receiving passengers and freight in the city of Portsmouth to be carried on its line, and by returning to the city in like manner, it made no difference that it transported them by steamboat, and that by doing business as it did, its road was located into the city and was liable to be sued and served like any other railroad doing business in the city of Portsmouth. The service of the summons was sustained, and defendant was held to answer.

Maurice L. Galvin and H. T. Bannon, for the Railroad.

Evans & Livingstone, for the plaintiff.

[This decision is applicable to Lawrence, Adams, Brown and Clermont counties, which the Chesapeake & Ohio Railroad reaches, in the same manner as it is to Scioto county.]

ATTORNEY FEES.

[Lucas Common Pleas.]

MICHAEL H. GOLDEN v. TOLEDO (CITY).

Action to recover the amount of a sidewalk assessment and attorney's fees expended in an assessment suit against the owner of the property in front of which the sidewalk was constructed, in which suit plaintiff was defeated. Held, that plaintiff could recover attorney's fees.

Stephen Brophy, for plaintiff, cited Dillon on Municipal Corporations, section 472; Sedgwick on Damages, section 236; 31 Ohio St., 242; 7 Johnson, 167; 1st Story, 458; 56 N. Y., 673; 122 Mass., 100; 11 Ohio St., 120; 31 Ohio St., 574; 9 Dec. Re., 463.

Charles Watts, City Solicitor, for defendant.

HARMON, J.

The petition contained two causes of action. In the first, plaintiff alleges that he contracted with defendant to construct a certain sidewalk

Golden v. City of Toledo.

on Hicks street, and that defendant agreed to give him for constructing said sidewalk a certain valid assessment against abutting lots.

Plaintiff constructed the sidewalk, and the defendant gave him an assessment against lots on the street, among which were certain lots belonging to Arthur Cowdrick. Cowdrick refused to pay the assessment, and plaintiff brought suit against Cowdrick and failed to recover, because the city before letting the contract to plaintiff, had failed to give notice to Cowdrick to construct the sidewalk himself.

In the first cause of action, plaintiff seeks to recover the amount of the assessment and interest. In the second cause of action, plaintiff seeks to recover attorney's fees expended by him in his suit against Cowdrick.

To the second cause of action, defendant interposed a demurrer, claiming that plaintiff cannot recover attorney's fees.

Held by the Court : Judge Dillon in his work on Municipal Corporations, section 472, lays down the rule that the contracts of municipal corporations, within their legal powers are binding upon them the same as contracts of individuals. Numerous authorities may be cited in support of that proposition.

As to the right to recover attorney's fees, there is a conflict of authorities in different states. In New York, it has been held that parties may recover attorney's fees incurred by reason of breach of contract by defendant. *Kipp v. Brigham*, 7 Johnson, 167; *Dubois v. Hermance*, 56 N. Y., 673. Also, in Massachusetts, *Westfield v. Mayo*, 122 Mass., 100. And in Ohio, *McAlpin v. Woodruff*, 11 Ohio St., 120; *Lane v. Fury*, 31 Ohio St., 574.

It was held by the Cincinnati Superior Court, at General Term, by Judge Force, in *Kirchner v. City of Cincinnati*, 9 Dec. Re., 463, citing *McAlpin v. Woodruff*, 11 Ohio St., 120, and *Lane v. Fury*, 31 Ohio St., 574, that on failing to recover from lot owner the full amount of assessment for the construction of a sewer, by reason of failure to advertise and obtain bids for part of the work and material, that the measure of damages against the city for failure to deliver a valid assessment for full amount of the contract, is, first, the difference between the amount which plaintiff was entitled to recover under his contract and the amount collected from the property owner. Second, costs taxed in the action against the lot owner. Third, a reasonable allowance for counsel fees in the action against the lot owner.

It is urged in the case at bar that if the city had given plaintiff a valid assessment, he would have recovered in his action against the lot owner, the amount of assessment and costs, and not attorney's fees; and that he could only require the city to place him in the same position that he would have been in had the city given him a valid assessment.

This is assuming that a lot owner would attempt to make a defense to an assessment when he had no valid defense. The court will not assume that.

Demurrer to the plaintiff's second cause of action overruled.

REFORMATION OF CONVEYANCES.

[Perry Common Pleas.]

Decided July 16, 1894.

LEWIS STOLTZ V. ELI VANATTA ET AL.

1. Parol evidence is not admissible to convert a deed, based on no valuable consideration, or one merely nominal, into a deed for value, so as to defeat an existing attacking creditor or give such creditor a preference over him.
2. A court of equity will not reform an ineffectual voluntary conveyance so as to give one creditor preference over another creditor where their equities are equal.
3. A court of equity will not reform a deed on an allegation of mutual inadvertence of parties to the transaction, for the purpose of making such preference.

HUFFMAN, J.

The plaintiff in this case brings his action to set aside a deed made by the defendant, Eli Vanatta, to John Vanatta, and a deed made by said John Vanatta to Hannah Vanatta, the wife of said Eli. These deeds were both made and dated January 20, 1892. The petition alleges that the deed of Eli to John was made on the consideration expressed in the deed of John to Hannah of one dollar. Said petition sets up a judgment recovered by Stoltz against Eli Vanatta, at the February term of this court, 1894, for the sum of \$581.10; that said judgment was recovered upon a promissory note made by said Eli to said Stoltz on September 15, 1883; that said Eli was the owner of said real estate from August 26, 1873; and that after he made said conveyance to his wife, he had no property left subject to execution; and said conveyance was in fraud of his rights as such creditor of Eli.

The joint answer and amendment thereto filed by said Eli and Hannah, admit the recovery of said judgment; that it was for the debt alleged; and that said Eli at the time of the conveyance to his wife was unable, except for said real estate, to pay his debts. The petition alleges the value of said real estate to be \$2,000.00, and the answer admits it to be \$1,600.00. The answer and amendment admits the consideration expressed in said deeds to be as alleged in the petition, and set up that by the mutual inadvertence of the scrivener and said Eli and Hannah, certain other considerations set out in said answer and amendment are not expressed or named in either of said deeds; but allege that there was other and different considerations from those named in said deeds, which are averred to be the release of a mortgage and other indebtedness of said Eli to Hannah.

To this answer, and amendment thereto, the plaintiff demurs. In support of his demurrer the plaintiff claims that the deed, being a voluntary conveyance and covering all the property said Vanatta had, is prima facie fraudulent, and that it cannot be contradicted by parol evidence; that the Vanattas can not show another and different consideration than that named in the deeds. The defendants claim that the deeds can be contradicted, and that they may show that the deeds are not in fact voluntary; but that they may show that another and different consideration passed than that named in the deeds; that deeds may be contradicted which on their face and by their terms are voluntary, may be shown to be deeds for value, and the consideration shown, and that, against this creditor who now attacks them for fraud.

On the solution of this question the ruling upon the demurrer depends.

The first named deed has no consideration expressed in it whatever. It simply states that it is made to John Vanatta in consideration "that he will immediately convey the same to Hannah Vanatta." The other, from him to Hannah, is made in consideration of one dollar. One dollar is not a valuable consideration for property confessedly worth \$1,600.00. I think such a consideration for property of that value is universally considered nominal, and I also think that the rules may be considered settled, at least in Ohio, that under such circumstances as exist in this case a change can not be made from one kind of consideration to another by parol.

In the case of *Burrage's Lessee v. Beardsley*, 16 Ohio, 438, the court, on page 442, say: "Love and affection is a good consideration for a deed. The grantor, however, did not profess to have conveyed upon any consideration of that kind. The grantees did not receive the deed upon these terms, but in consideration of three thousand dollars paid, or to be paid; and as between the grantor and the grantees, what the deed expressed, was the evidence of their contract.

"Neither sound principles, nor the statute of frauds and perjuries, would permit them to alter or vary it by parol. It would introduce a rule productive of great mischief, to permit a written instrument of so solemn a nature as a deed of bargain and sale, to depend upon the inventive recollection of any witness, and to allow titles to be set up by oral testimony, in opposition to the written and recorded evidence required by statute. So far from being unfounded in reason, it would be difficult to imagine anything more directly in conflict with reason and principle, than to permit a deed thus assailed to be set up, by proving it false upon its face."

And the court, on page 443, quoting from 11th Wheat., 213, say: "Had the evidence been offered for the purpose of showing that the deed was given for a valuable consideration, and in satisfaction for the debt due from the father to the son, and not for the consideration of love and affection, as expressed in the deed, it might well be considered as contradicting the deed. It would then be substituting a valuable for a good consideration, and a violation of a well settled rule of law, that parol evidence is inadmissible to substantially vary a written agreement."

In the case of *Patterson v. Lamson*, 45 Ohio St., 77, in third proposition of the syllabus and last of page 89, and first of 90, the court lay down the rule to be that the recital in such deed, if a named sum of money, so far as concerns the operation and effect of the deed, is that it is not competent to show by parol proof that such instrument is in fact a deed of gift from a person not named in it, and that the named consideration was in fact paid by him.

In *Holmes v. Sullivan et al.*, 9 Dec. Re., 499, decided by Judge Wright, of the Miami common pleas, in a case directly in point and well considered, the court announces the same doctrine.

The case of *Houston v. Blackman*, 41 Am. Rep., 756, (66 Ala., 559), has this syllabus: "A deed of lands from husband to wife, expressed to be in consideration of love and affection and one dollar paid, is voluntary as to then existing creditors of the husband, and if assailed by them, parol evidence is incompetent to show valuable consideration."

And on page 759, quoting from the 16 Ala., page 90, the court say: "Here the deed sets out the consideration on which it purports to have

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been executed, to-wit, the anxiety of the grantor to provide for his wife, and one dollar in cash paid. The proof would establish that the deed was executed in conformity to the understanding entered into by Dorsey, at the time the negroes were delivered to him. This is a consideration entirely different from that mentioned in the deed, and parol proof cannot be received to establish it without violating the well settled rules of evidence."

Wait on Fraudulent Conveyances, sec. 221, lays down the same rule in clear and explicit terms.

The position which the defendants occupy in this case is that of asking a court of equity to reform a deed, so as to convert a voluntary conveyance into a deed for a valuable consideration. By the deed, as made, this creditor has a right to come into a court of equity and have it set aside, and the property appropriated to the payment of his debt. Will such court on the application of the parties to the deed change plaintiff's present status by converting a deed from a voluntary conveyance into one of value, at the instance of a party who has, to say the least, no greater or better equity than he? Will a court of equity, by its action, give to the wife of this debtor a preference over the creditor whose rights are at least equal to hers, by making for her now an instrument to effectuate that purpose? Equity is equality, and if a court of equity should by its decree make an instrument other and different from that which the parties themselves had made, and by such change give the party in whose favor such change is made a preference over another creditor not given by the instrument as executed by them, the well known rules and principles of such courts would surely be violated; and instead of the court sitting to work out equity and equality between the parties, it would sit for the purpose of giving one party advantage over the other.

That it will not and ought not to do so is established by an unbroken line of authority.

In the case of *Anderson v. Tydings*, 63 American Decisions, 708 (8 Maryland, 427), the court in the first and second propositions of the syllabus say: "Debtors may give preference to one creditor over another, if the instrument intended to effect that object contains the requisite provisions. But if by mistake of law, the parties adopt such an instrument as can not effect their intention without the aid of a court of equity, the court will not correct the mistake by reforming the instrument, to the prejudice of the general creditors of the debtor, in very embarrassed circumstances. Courts of equity will not deprive creditors of a legal advantage which they have by reason of a mistake of law in the drawing of a deed, by reforming such deed for the benefit of parties who have no stronger equity than they."

In *Henderson v. Mayhew*, 41 Am. Dec., page 434, (2 Gill. Md., 393), the court say: "Parol evidence is inadmissible to change or contradict the terms of a written instrument. Strangers to the instrument, when authorized to impeach or contradict it, may offer parol testimony for that purpose; and so a grantor may, in a controversy with the grantee, if he charges the same to have been obtained by fraud or mistake. But the parties to a written instrument are not permitted, in controversies with strangers, to insist that it does not express what it was intended to express."

In *Hunt v. Rousmaniere's adm'rs*, 1 Peters, page 1, last paragraph of opinion, that court in speaking of the case before them say:

"If the court would not interfere in such a case, generally, much less would it do so in favor of one creditor against the general creditors of an insolvent estate, whose equity is, at least, equal to that of the party seeking to obtain a preference, and who, in point of law, stand upon the same ground with himself."

The text books and decisions also hold, that equity will not relieve when the deed is voluntary. 5 Lawson's Rights and Remedies, sec. 2307; 2 American St. Rep., 343; 18 American Decisions, 573.

"Neither will equity relieve a person from erroneous acts and admissions resulting from his own negligence." Pomeroy's Equity, sec. 889, page 1159.

In conclusion, I desire to refer to the language used by Judge Gaston, in the case of *Wilkinson v. Wilkinson*, 2 Dev. Eq., 379. In considering this question, he said: "Written instruments are to be regarded as the authentic and permanent memorials, which the parties pass deliberately, appointed to testify to all, and forever what they have done. Parol evidence is in its nature less satisfactory. It may be tainted with falsehood, perverted by ignorance, prejudice, favor, or mistake, and is liable to mislead, because of the weakness of human memory. It is not to be questioned but that the general rule, which declares parol evidence inadmissible to contradict or substantially to vary the terms of a written instrument, obtains in a court of equity equally as in a court of law. The consideration upon which a deed is made, is an important part of the contract; and when it is distinctly declared, parol evidence is not more admissible to contradict or substantially to vary that, than any other term upon which the parties have thus expressed their agreement."

Applying to this case the principles laid down by the authorities, and well-known rules of both law and equity, the defendants pleadings do not constitute a defense, and this court is not authorized to grant them the relief they ask for.

The demurrer is therefore sustained.

Cochran & Powell and Ferguson & Johnston, for plaintiff.

W. E. Finck, W. E. Finck, Jr., and Owen & Yost, for defendants.

JURY LAW.

[Superior Court of Cincinnati, Special Term, June 5, 1894.]

MCDONALD v. LANE & BODLEY.

The act of May 18, 1894, repealing the struck jury law, does not affect cases pending at the date of its passage.

SMITH, J.

This action has been at issue for some time; has been twice tried before struck juries; and upon both trials the jury disagreed.

The case having been called again for trial, upon the regular calendar, counsel for defendants have directed attention to the fact that their demand for another struck jury is on file and was so filed prior to the date of the passage of the recent act of the general assembly repealing the struck jury law. They therefore, ask that the case be transferred to the list of struck jury cases, and that they be given the right to a trial before a struck jury.

The plaintiffs resist this application, denying the right of the defendants to a trial before a jury other than the regular one, drawn from the wheel as provided by law.

The decision of the motion depends upon the construction of the act repealing the law providing for struck juries, which former act "must be read as though sec. 79 was appended to it as a saving clause." *Bode, administratrix, v. Welch*, 29 O. St., 21.

The act was passed May 18, 1894, and reads as follows:

"An act to repeal secs. 5185, as amended February 26, 1880, 5186, 5187 and 5188, of the Revised Statutes of Ohio."

"Section 1. Be it enacted by the general assembly of the state of Ohio, that sec. 5189 of the Revised Statutes of the state of Ohio, as amended March 29, 1881, be amended to read as follows:

"Section 2. That secs. 5185, 5186, 5187 and 5188, of the Revised Statutes of Ohio be, and the same are hereby repealed.

"Section 3. This act shall take effect and be in force from and after its passage."

The secs. of the Revised Statutes relating to struck juries are 5185, 5186, 5187, 5188 and 5189.

It may fairly be said of the above act, that it is at least not happily worded.

Section 1 refers to sec. 5189 as amended March 29, 1881, when such sec. was not at that time amended, the act of March 29, 1881, enacting certain secs. as supplementary to 5189, and calling them 5189a to 5189m (inclusive), no change being made in sec. 5189 itself.

In addition to this defect of expression, sec. 1 would seem to be substantially defective in an omission to state in the sec. in what respect sec. 5189 is to be amended; for, after declaring that it shall "be amended to read as follows," it fails to have anything follow.

Three constructions of this repealing act suggest themselves as possible.

The first one is, that sec. 2, which repeals 5185, 5186, 5187 and 5188, takes the place of the act of March 29, 1881, and therefore the place of secs. 5189a to 5189m, inclusive, and all other parts of that law, and that said law is therefore repealed by implication.

Inasmuch, however, as secs 5189a to 5189m, (inclusive) provide for jury commissioners, a jury wheel, challenges, etc., the result of this construction would be to wipe out not only the struck jury system, but also the regular jury system. As such a result could not have been within the contemplation of the general assembly, the construction must be abandoned.

Another construction is suggested by the following facts:

The act of March 29, 1881, which, as has been said, enacted secs. 5189a to 5189m (inclusive), contained two secs. The first sec. contained the supplementary secs. 5189a to 5189m. The second sec. repealed certain laws; and in view of the fact that the provisions for drawing juries under the new law could not go into effect before May, 1881, declared that the act should not "affect any action, prosecution or other proceeding at law of whatever nature, in which the jury has been or may hereafter be drawn before the time for the drawing of juries under the provisions of this act, and as to such actions, prosecutions or proceedings, the statute in force at the date of the passage of this act shall continue applicable." This section, however, did not apply to struck juries, 5189b. But as over thirteen years have passed since that sec. was enacted, and

its purpose has long since been accomplished, it is now obsolete, and it may have been the intention of the general assembly to substitute in place of it sec. 2 of the law now under examination.

Another possible construction is that the intention of the law was to so amend sec. 5189 as it appears in the Revised Statutes, relating to struck juries, so that it would read as follows:

"Section 5189. Sections 5185, 5186, 5187 and 5188, of the Revised Statutes, be, and the same are hereby repealed."

But whichever of the latter two constructions is the true one, the effect is the same, viz.: A repeal of the law giving the right to struck juries, without any reference to pending cases. But sec. 79, of the Revised Statutes, reads as follows:

"Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions or proceedings, unless so expressed; nor shall any repeal or amendment affect causes of such action, prosecution or proceeding existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

This sec. grew out of the act of February 19, 1866, which read as the sec. now reads, except that the words "and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions or proceedings unless so expressed," were not in the act, and were not inserted until the revision of the statutes of 1880, where it has since remained unchanged.

The amendment of 1880 was doubtless suggested in part by the decision of the Supreme Court in *Warner v. Railroad Company*, 31 Ohio St., 265, in which it was held that a statute changing the number of jurors in a jury trial before a justice of the peace from twelve to six applied to pending actions, because such law related to the remedy, and the statute of 1866 did not apply to repeals of acts remedial in their nature. The amendment of 1880 corrected this defect in the act of 1866, but since 1880 no law relating to the remedy shall affect pending actions and proceedings unless so expressed.

There can be no dispute that this case was a pending action at the time the law was passed repealing the struck jury law; and in view of the decisions of our Supreme Court, there can be no doubt in my opinion, that it is remedial in its nature.

It is not necessary, in the decision of the question presented by this motion, to undertake to give a comprehensive definition of the word "remedy," as used in sec. 79, by which every law of doubtful remedial nature may be tested, and its character as a remedial statute or otherwise determined; because the decisions of the Supreme Court have at last settled the question that matters relating to the impaneling of the jury are matters pertaining to the remedy.

And it is also settled that other matters relating to the trial, such as the right to file petitions in error and the right to have a cause removed for trial to an adjoining county on account of the interest of the judge in the pending cause, are laws relating to the remedy, and controlled by sec. 79. *Arrowsmith v. Hamering*, 39 Ohio St., 596; *State ex rel. Construction Company v. Rabbits*, 46 Ohio St., 178.

Superior Court of Cincinnati.

The decisions relating to the impanneling of the jury to which I have previously referred are *Hartnett v. State*, 42 Ohio St., 568, and *Palmer v. State*, 42 Ohio St., 596.

By an amendment to sec. 7278, passed March 18, 1884, and commonly known as the Pruden Jury Law, certain grounds of challenge which, before this law, the parties were entitled to, were taken away from them. *Hartnett* and *Palmer*, against whom prosecutions were pending for murder in the first degree, at the time of the passage of this law, were, against the objection of their counsel, nevertheless tried as though such law applied to them. Their convictions, however, were reversed upon the ground that the law relating to the right of challenge of a juror was one which affected the remedy, and that as the law had not in express terms been made applicable to pending prosecutions, it was error in the lower court to so apply it.

In the *Hartnett* case, Follett, J., says in the syllabus :

"By virtue of Revised Statutes, sec. 79, in impanneling a jury for the trial of a person accused of a crime and against whom the prosecution was pending when sec. 7278 was amended March 18, 1884, such accused person is not precluded by that amended act from using causes of challenge allowed by the sec. thus repealed."

And in the *Palmer* case, McIlvaine, J., said :

"The judgment below must be reversed for another error appearing in the record. The defendant was tried in June, 1884, and the jury was impaneled under the Pruden law, which was passed on March 18 of that year. The crime for which the accused was tried and convicted, was committed in December, 1883, and the prosecution of defendant therefore was commenced soon thereafter, the first indictment being found against him jointly with one Berner, for the crime of which he was convicted in January, 1884. This indictment having been destroyed by fire, another indictment for the same crime was returned by the grand jury in May of the same year. The Pruden law was passed after the prosecution had commenced, and while it was pending. The Pruden law repealed the original sec. 7278, of Revised Statutes, which was in force at the time the crime was committed, and when the prosecution therefor was commenced, and for some months while such prosecution was pending in the court of common pleas of Hamilton county."

Then, quoting sec. 79, he continues as follows :

"By this sec. it is quite clear that the Pruden law had no application to the prosecution of plaintiff in error, which was pending before its passage.

"The repeal and amendment of sec. 7278 related to the remedy for the offense that was then being prosecuted against the plaintiff in error, and it was not expressed in the amended act that it should have effect in pending prosecutions.

"It follows, therefore, that the jury in this prosecution should have been impaneled in accordance with the provisions of the repealed sec."

These decisions, aside from the fact that they relate generally to the impanneling of the jury, are especially in point, for the reason that in the cases in which they arose, the particular point in which the new law differed from the old one, was in the matter of challenges to jurors ; and in the impanneling of the jury under the struck jury law, the right of peremptory challenge is quite different from that which can be exercised in impanneling the regular jury.

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For the reasons stated, I am of the opinion that, inasmuch as this law relates to the remedy and does not expressly relate to pending actions, it can not be so held to apply, and that in the language of our Supreme Court in *State ex rel. v. Rabbits*, "no generality of language nor use of the present tense can be accepted by the courts as a substitute for such express indication of the legislative intent. This, we think, is the only proper construction to be given this clause in the above quoted sec. (79). The provision has not merely the advantage of being a rule of certainty in construction, but also of exciting the attention of the legislature and begetting an inquiry as to the propriety of applying a given amendment of a remedial nature to pending actions, prosecutions or proceedings."

Motion to send cause before a struck jury granted.

Thomas McDougall and Willis M. Kemper, for the motion.

Follett & Kelley, contra.

STOCKHOLDERS—LEASES.

[Hamilton Common Pleas, July 20, 1895]

EVAN J. HENRY V. THE P., C., C. & ST. L. RY. CO., AND THE C. & M. V. RY. CO.

1. A stockholder in a railway company may sue on behalf of the stockholders to enforce rights when the corporation refuses to sue, and the fact that he may be otherwise interested is immaterial.
2. A decree in a suit brought by the trustee of a mortgage for the foreclosure of that mortgage, does not estop the same person suing as a stockholder.
3. The agreement in the lease from the Cincinnati & Muskingum Valley Railway Company to the Pittsburg, Cincinnati & St. Louis Railway Company, whereby the latter company agreed to advance the money necessary to pay the coupons on the bonds of the former; such advance to be paid out of subsequent earnings and not otherwise, held to be not harsh, oppressive or inequitable, and not to be an agreement to loan money to an insolvent corporation, which the court will not enforce.
4. Such agreement held not to be conditional upon the furnishing of funds to make certain betterments.
5. The lease of a railroad cannot be rescinded except by the same consent of stockholders required to authorize a lease.
6. The court refused to compel the lessee of a railroad to specifically perform a covenant requiring it to operate the leased line.

STATEMENT OF CASE.

The railroad from Zanesville to Morrow was constructed by the Cincinnati, Wilmington & Zanesville Railroad Company, organized in 1851.

In 1852 the company issued its bonds to the amount of \$1,300,000.00 bearing seven per cent. interest, and secured the same by its mortgage upon the railroad and all its property and franchises. The company made default in payment of interest on the bonds, and in 1857 suit was brought in the United States circuit court for the Southern District of Ohio, to foreclose the mortgage, in which case a decree was taken, and the mortgaged railroad, property and franchises were sold under the

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decree in 1863, at public auction, for \$600,000.00, to Charles Moran, who purchased in trust for such creditors and stockholders as should unite in an agreement for reorganization.

Thereupon said parties re-organized the company under the name of The Cincinnati & Zanesville Railroad Company, and this company issued its bonds to the amount of \$1,300,000.00 bearing seven per cent. interest, to the holders of the mortgage bonds of the original company and secured them by a mortgage on all its road, etc.

This company in turn made default in payment of interest on said bonds, and in 1869 suit was brought in said circuit court to foreclose said mortgage, and a decree being taken, the mortgaged property was sold to Thomas L. Jewett for \$1,004,000.00, the property to be conveyed to such parties as Jewett should direct.

In 1870 the holders of said bonds reorganized the company under the present name of The Cincinnati & Muskingum Valley Railroad Company (and hereinafter for convenience called the Muskingum Valley Co.), and by direction of Jewett the said railroad property and franchises were conveyed to said company.

Thereupon the said Muskingum Valley Co. made its bonds to the amount of \$1,500,000.00, being 1,500 bonds of \$1,000 each, and payable in thirty years from January 1, 1871, and secured the same by its mortgage to Charles Moran and J. Edgar Thompson, trustees, and issued 1,300 of said bonds to the holders of said bonds of said Cincinnati & Zanesville Railroad Co.

The Pennsylvania Railroad Co. became the owners of 754 of said bonds, and Moran Brothers became the owners of more than 400, and E. J. Henry received ten bonds. The fifteen hundred (1500) bonds so made contained a provision that the stockholders of the Muskingum Valley Co. should not be personally liable for any portion of the principal or interest thereof, and which provision was recited in the mortgage. The bonds bore interest at the rate of seven per cent. per annum, payable semi-annually, according to interest warrants or coupons thereto attached.

The Muskingum Valley Company issued 71,473 shares of capital stock, of which 550 shares were distributed to E. J. Henry; 26,555 to Charles Moran; and 44,368 to the Pennsylvania Railroad Co.

In addition to these shares, 8,527 shares were subscribed for by sundry persons, and the proceeds applied in the extension of the road to Dresden Junction, and of which 8,527 shares Moran Brothers took 2,188, and the Pittsburg, Cincinnati & St. Louis Ry. Co. (and hereinafter for convenience called the Pan Handle Co.) took 4,250 shares. Some shares subscribed for were not taken, and the total outstanding stock of the Muskingum Valley Co. was 79,946 shares. The 44,368 shares belonging to the Pennsylvania R. R. Co., and the 4,250 belonging to the Pan Handle Co., were afterwards, in 1872, transferred to the Pennsylvania Co.; so that the company held 48,618 shares of the total 79,946 shares outstanding.

The Muskingum Valley Co. extended the road from Zanesville to Dresden Junction, and applied the proceed of certain stock subscriptions, and the proceeds of 200 of these mortgage bonds (less a balance of \$1,200.00), in paying the expenses of such extension. The mortgage executed to secure said bonds included this extension of the road. That is, the mortgage covered the road, etc., from Dresden to Morrow, a distance of 148 miles.

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After this extension was made the road of the Muskingum Valley Co. came in conjunction with the Pan Handle Co. at Dresden and at Morrow, so that the lines of the rails of the Muskingum Valley Co. were brought into connection with the rails of the Pan Handle Co. at these two points.

The line of road of the Pan Handle Co. extended from Pittsburg through Dresden to Columbus, and from Columbus through Morrow to Cincinnati, and from Columbus to Indianapolis and Chicago. The Muskingum Valley Co. operated its road down to May, 1873.

As stated, the road had been twice sold under foreclosure on failure of the company to pay interest on its bonds. After the reorganization of the company in 1870 and the extension of the road from Zanesville to Dresden Junction, there seemed to be an improvement in its business. The third vice-president of the Pan Handle Co. wrote to Mr. Moran on September 18, 1871, that he was informed by the president of the Muskingum Valley Co. that the net earnings of the line were then amply sufficient to meet the interest on the mortgage debt. A statement issued by H. J. Jewett, president of the Muskingum Valley Co. in October, 1871, was to the effect that the earnings of the road since it belonged to its then owners had been sufficient to meet the interest on the bonds due to the part of the road in use, and Mr. Thompson, a trustee under the mortgage, stated that the earnings were sufficient to meet the interest. In a letter written by Mr. Jewett, on November 15, 1872, he says:

"The business of the road is on a continual increase. * * * With the present equipment the road can earn enough to maintain itself and pay the interest upon its present debt, with some surplus. But with an equipment equal to its necessities, it can increase its earnings largely, without any corresponding increase of expense. * * * The property is a valuable one and needs only proper handling and management to develop satisfactory and profitable results."

In a letter written by Mr. Churchill and Mr. Fillmore, two of the directors of the Muskingum Valley Co., to Mr. Moran, on December 10, 1872, they call attention to the fact that the road had demonstrated that it could earn enough to pay the interest on its bonds.

For the fiscal year ending March 31, 1872, the road was operated at a net profit of over \$41,000.00—the interest on the bonds being included as an expense. The report of the directors for this year is to the effect that the business on the line of the road was improving, and that by giving to it all reasonable facilities, the stockholders might safely calculate on a large increase of traffic and passage travel. The net earnings in the year 1873, however, were not sufficient to pay the interest on the bonds.

Mr. Becker, an engineer familiar with the line, says that from the time of the reorganization of the road in 1869 to 1873 there was no other road lying either parallel with it or intersecting it, so that there was during that time no competition to its local traffic; but that since that time quite a number of new roads have been constructed which lie parallel to it or intersect it and compete with it for business.

The Pennsylvania Company and the Pennsylvania Railroad Company are corporations under the laws of Pennsylvania. The Pennsylvania Railroad Company owns a large majority (being the entire stock, excepting not exceeding \$5,000, outstanding for the purpose of qualifying directors) of the Pennsylvania Company.

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In the years 1872 and 1873 and until the year 1890, the capital stock of the Pan Handle Co. consisted of about 168,671 shares of \$50 each, of which amount the Pennsylvania Railroad Company held 60,000 shares, and the Pennsylvania Company held 75,576 shares.

In 1872 and 1873 and during the following years, the capital stock of the Muskingum Valley Co. amounted to about 79,932 shares of \$50 each, and of which the Pennsylvania Company owned and held 48,618 shares.

In the years 1872 and 1873 there were seven directors of the Muskingum Valley Co., viz: Charles Moran, George B. Roberts, Thomas A. Scott, E. E. Fillmore, H. J. Jewett, M. Churchill and G. W. Adams. H. J. Jewett was the president. Of these directors, George B. Roberts, Thomas A. Scott and G. W. Adams were also directors of the Pan Handle Co., Thomas A. Scott being the president of the Pan Handle Company, and, as stated in argument of the Pennsylvania Railroad Co. H. J. Jewett was also the general counsel of the Pan Handle Co.; and a director and general counsel of the Pennsylvania Company.

On September 12, 1871, Edmund Smith, the third vice-president of the Pennsylvania Railroad Co., wrote to Mr. Moran saying they had \$807,000 of the first mortgage bonds of the Muskingum Valley Co., asking if he could name a price for them. Mr. Moran answered on September 13, 1871, to the effect that the bonds could easily be placed were it not that the past embarrassments of the companies which had owned the road had thrown discredit on the enterprise, which nothing could remove except several years' revenue sufficient to meet all expenditures and a surplus beyond the interest. "If, however, your company can and will legally guarantee the payment of the principal and interest of these bonds, I think it very possible that we could dispose of them at a fair price through our friends in Europe. This guarantee seems to us especially proper and safe for your company, because by its control of the western and eastern traffic it can either direct to or divert from the C. & M. V. Ry. whatever portion of that traffic your company may deem proper, and thus secure earnings amply sufficient, not only to make the bonds, but even the shares, of the C. & M. V. Ry. Co. undoubted investments, having a satisfactory current market value."

To this Mr. Smith wrote an answer of date September 18, 1871, in which he says: "I am informed by the president of that (the Muskingum Valley) company, that the net earnings of the line are now amply sufficient to meet the interest upon its mortgage debt. They will no doubt be largely increased upon the opening of the line from Zanesville to Dresden," and that the Pennsylvania Railroad Company was not prepared to make the endorsement on the bonds suggested, but preferred they should rest on their own merits.

In May, 1872, a proposed lease of the Muskingum Valley Road to the Pan Handle Co. was submitted to Mr. Moran, representing the minority stockholders and bondholders of the Muskingum Valley Co.; and he refused assent to it, saying in a letter written on May 8th, to Mr. Scott, president of the Pan Handle Co.: "After perusing the proposed lease of the C. & M. V. Ry. Co. I find it a mere conveyance of the road for a period of ninety-nine years, without one single stipulation in favor of the C. & M. V. Co. or the stockholders * * * any just, proper, equitable lease I will gladly assent to."

This seems to have been the first Mr. Moran knew of the proposed lease, as he wrote Mr. Scott, on the next day: "I wrote you yesterday

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a few hurried lines in regard to the contemplated lease of the C. & M. V. Road, a scheme which took me entirely by surprise, as I never supposed anything of the kind could be prepared for execution without a word on the subject being said to me, both as a director of the company and as representative of the large interest which Moran Brothers and their friends have in the company.

He states how he and his friends had joined in the purchase of the C. W. & Z. Road, and says: "Now, under such circumstances, do you think these interests should be sacrificed to the interest of your company? Is this all necessary to the attainment of the object you have in view, and for which you make the lease? If the sacrifice of the C. & M. V. be necessary, at least the interest of Moran Bros., and their friends, who in good faith joined you as co-partners and co-operated with you in all your views, should be protected.

Mr. Scott, on May 9th, answers the letter of May 8th, and says that their sole purpose was to get the property into shape where it could be worked on the most economical basis possible, and be entirely within the control of its owners as to revenue; that the lease is made to cover every dollar of revenue received from its business, beyond the actual current expenses; so that bondholders and stockholders must realize everything that can be made out of it. In doing this we supposed that we were doing the very best thing for our 8-13 of the property, and of course, putting your 5-13 on the same basis as our own investment,"—and asks Mr. Moran for suggestions as to any amendments or additions to the lease "that will place your ownership in any better position than it is. * * * ; as we have but one object in view, and that is to get rid of a costly organization and to reduce the expense of operating the road to a minimum, and at the same time be able to control for it whenever necessary, such equipment as will give to the line the greatest possible efficiency and earning for its owners," and says: "Rest assured, my dear sir, that you shall always find us endeavoring to protect all that are interested with us in property of a like character."

On May 11th, Mr. Moran answered this to the effect that the assurances of Mr. Scott had removed all doubts, and the only thing remaining to be done was, "To so arrange the lease so that your successors may not do, by virtue of it, what I am sure you have no intention of doing."

A new form of lease was thereupon submitted to Mr. Moran, to which he objected in a letter, dated June 7, 1872, to Mr. Scott, because it contained no stipulation to protect the interest of the stockholders of the Muskingum Valley Co.; because under it the lessee could fix rates of toll against the interest of the lessor; could divert traffic from road of lessor; could make improvements at the expense of lessor which the lessee may deem necessary, and asks out of what they shall be paid if they exceed the surplus earnings; because any difference is to be submitted to umpires appointed by both parties, when the lessee, owning a majority of stock of the lessor, controls the officers and through them the umpires; because the lessee could so manage the leased road as to render the foreclosure of the mortgage inevitable, and its sale produce little or nothing, and thus buy it in at the foreclosure sale; and he demands that the meeting of the directors of the Muskingum Valley Company be postponed.

This resulted in an interview between Mr. Scott and Mr. Moran.

Subsequently, at a meeting of the directors of the Pan Handle Company, held on June 10, 1872, the president laid before the board the matter of a lease of the Muskingum Valley Railroad, and made a statement of the views and desires of Charles Moran, owner of 5-13 of the stock of the Muskingum Valley Co., and it was thereupon resolved that the president of the company be authorized to execute a lease of the Muskingum Valley Railroad to this company on such terms and conditions as may be prepared by the counsel of this company and approved by the stockholders of the Muskingum Valley Company.

On October 12, 1872, Mr. Scott wrote to Mr. Moran: "After going over all the matters connected with the M. V. Road, we are clear that the best thing to be done for its shareholders is to lease the road to the P., C. & St. L. Co. on the terms set forth in the enclosed lease, by which the shareholders will get all its returns," etc.

Mr. Moran, in his letters of October 15th and 18th to Mr. Scott, objects to the new proposed lease because it does not protect the stockholders of the Muskingum Valley Co.; he insists that examinations of accounts and arbitration would be of no avail since the president of the Muskingum Valley Co. is appointed by and therefore only represents the interests of the Pan Handle Co. and he suggests nine modifications in the interest of the stockholders and bondholders of the Muskingum Valley Co., some of which look to the protection of traffic over the leased road and the regulation of rates of toll; that the Pan Handle Co. shall at no time make or prescribe any regulation adverse to the direction of traffic to or from the Muskingum Valley Road, nor place any impediment to the direction of traffic to the latter road; that the Little Miami Railroad should pro rate between Morrow and Cincinnati on all traffic to and from the Muskingum Valley Road, and permit the trains of the latter to run through to and from Cincinnati whenever it is necessary to the development of the traffic of the Muskingum Valley Co. at the usual mileage; that the tolls for through traffic over the Muskingum Valley Road shall be at all times the same as those charged by the Pan Handle Co. over their own road, and the latter company shall pro rate with the Muskingum Valley Co. on all through traffic going to points on either road; and one of which is as follows: "The P., C. & St. L. Co. shall guarantee that the net traffic of the C. & M. V. shall never be less than the amount necessary to pay the interest on the present first mortgage debt, and any deficiency, should there occur any, in the net earnings to meet the interest on said bonds, shall be made up by the P., C. & St. L. Co." Moran says: "This is just and proper because the latter company will entirely control the traffic of the C. & M. V. Co., both as its lessee and as owners and lessees of the only outlets of the traffic of the C. & M. V. Co.," and suggests that it can only be through the fault of the Pan Handle Co. that the future earnings of the road should ever fall below those of the last year which showed a surplus.

Moran further suggests that the provision relating to the work required to perfect and completely finish the road, and as to the additions and improvements, and which were the same in that draft as in the lease finally executed, should be made to read that they may be made by the party of the second part (Pan Handle Co.) at the expense of the party of the first part, but no such expenditure for future work and improvements shall ever be made in excess of the surplus earnings after payment of the interest on the present mortgage debt, except with the assent of a majority of the shareholders of the Muskingum Valley Co. other than

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the shares owned or controlled by or held for account of the Pan Handle Co. and the Pennsylvania R. R. Co.

On November 15, 1872, Mr. Jewett wrote to Scott, Roberts and Moran, directors of the Muskingum Valley Co., with reference to a proposed issue of \$500,000 second mortgage bonds to increase the equipment, and submitted the matter to them. Thereupon, on November 18, Mr. Moran wrote to Mr. Scott to the effect that he would consent to such issue providing that he, Mr. Scott, was satisfied that the road could pay the money to earn the interest. He says, "You know the present condition and future prospects of the road better than I do," etc. He further says: "What has made me somewhat uneasy as to the future of the C. & M. V. Co. is the absence of all assurance that a portion of the traffic should be permitted to go over the C. & M. V. Road, which I am sure is the road that can do it most economically when properly equipped."

He suggests the execution of the lease with the protection to the minority interests in the Muskingum Valley Road as suggested in his letter of October 18th, and says that if the Pan Handle Co. fairly treats the Muskingum Valley Road there would never be any cause to exercise the rights reserved in favor of the minority shareholders.

On November 19, 1872, Mr. Scott wrote to Mr. Moran that he did not think the second mortgage bonds could be placed unless all the stockholders would take them pro rata. "Our idea of the Muskingum Valley line, if we had taken it under the lease, was to put on additional equipment and develop its coal trade with Cincinnati and to Cleveland, to effect which we have been endeavoring to arrange to get a line built from Dresden Junction, the point of connection with the P., C. & St. L. Ry. Co., over to the Cleveland & Mt. Vernon Road, a distance of about thirty miles. This would give the road a very good outlet to the lake at Cleveland, and the coal would then find a large market. I am sorry that you take the view that you do of the lease, as we proposed it, because I am convinced that it was the true plan to bring it out for all the stockholders in common. Of course our company would not be willing to assume the responsibility you name in your letter, but they are willing to work the line at its cost, and give the stockholders all the net results. This is all I think you in justice can ask them to do. Unless you will be prepared, in common with the other stockholders, to take your pro rata proportion of the bonds, I think it would be an unsafe proceeding to incur obligations looking to the negotiations of second securities. We might find ourselves in a very embarrassed position by such action." And he recommends the execution of the lease as proposed by Mr. Jewett, "and under it the line can be so developed without calling upon the stockholders as to ultimately make it a valuable property, in the meantime also providing that interest on the money now represented by the bonds in which you stand with us in common."

This resulted in another interview between Mr. Scott and Mr. Moran.

Mr. Scott, in writing to Mr. Jewett on November 27th, in regard to said interview, says: "He (Mr. Moran) finally agreed that the lease should be executed on the basis prepared by you, with two clauses in addition, to the effect: 1st. That in the event of the net earnings of the line not being sufficient to protect the interest on the existing first mortgage bonds as it matures, the lessee should advance the needful means to pay the coupons at maturity, charging any such advance over the net earnings, in open account, to be returned out of subsequent earn-

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ings. 2d. That any stockholders of the company should have the right, during the operation of the lease, to examine the books of the lessee to ascertain whether the conditions of the lease are being fairly complied with under the terms thereof."

And at a meeting of the directors of the Pan Handle Co., held on November 27, 1872, Mr. Scott stated that he had had a conference with Mr. Moran on the subject of the lease, and that he (Moran) was willing to assent to a lease in the form proposed, provided this company would agree to protect the first mortgage bonds by advancing the needful amount if net earnings are not sufficient to pay interest, and that the holder of one thousand shares should have the right to examine the books.

Mr. Scott said he had agreed to both conditions, and thought a lease should be effected at once, and it was thereupon resolved: "That the officers of this company have a lease of the C. & M. V. Railway prepared by Mr. Jewett with the additional provisions that this company will advance the amount needful to protect the interest on the first mortgage bonds, if the net earnings are insufficient, and charge such advance against future earnings;" also giving any stockholder right to examine the books, and that the same be submitted to a vote of the stockholders.

A correspondence follows which shows that there was a misunderstanding as to the terms agreed upon by Mr. Scott and Mr. Moran, and in the letter of December 4, to Mr. Scott, Mr. Moran says: "I distinctly understood you to acknowledge that your company, having the control of the entire traffic of the C. & M. V. Road, would guarantee that its earnings should never be less than the amount needed to meet the interest on the first mortgage bonds." And in his letter Mr. Moran pleads for delay in the execution of the lease until terms can be agreed upon.

At a meeting of the directors of the Muskingum Valley Co., held on December 6, 1872, to consider a proposition from the Pan Handle Co. to lease the line of road of the Muskingum Valley Co., and to which meeting a draft of a lease was presented, a resolution was passed that a meeting of stockholders of the company be called for the purpose of considering the proposition for lease and of assenting to or declining the same, and that the lease be submitted to the stockholders for their approval or rejection; that the president of this company be authorized to execute such lease, with such modifications as may be consented to by Charles Moran, one of the directors of this company, to be submitted to this board for approval, after such modifications are made and before the meeting of stockholders.

On December 9th, Mr. Jewett, president of the Muskingum Valley Co., wrote to Mr. Moran enclosing a copy of the lease as drawn under the direction of the directors of the Pan Handle Co., at the meeting of November 27th; also a copy of the resolution passed by the directors of the Muskingum Valley Co. on December 6th, saying: "You will perceive that the responsibility of the lease and the terms thereof is, by the board, confided pretty much to your hands. The action of the board thus far is not conclusive in any sense."

This lease provides for the advancement of money to pay interest "charging any such advance over net earnings, in open account, to be returned out of subsequent earnings."

On December 10, 1872, Churchill and Fillmore, two of the directors of the Muskingum Valley Co., wrote to Moran, calling his attention to the fact that the Pennsylvania Co. owned a majority of the stock of the

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Muskingum Valley Co.; also a majority of the stock of the Pan Handle Co.; that the proposed lease waives the protection given to minority stockholders, and the absolute control of the property is given to the lessee, and that therefore care should be taken as to its terms.

Moran answers this letter on December 13th, and encloses his letter of December 12th, which he had written to Mr. Scott, and suggests, if they think best, that an additional provision might be made, "that the interest on said bonds shall be paid on maturity without charge upon the future earnings of the C. & M. V. Railway."

On December 12th, Mr. Moran wrote to Mr. Scott objecting to the form of the lease as then proposed, and insisted on modifications. At the end of the provision relating to additions and improvements he wishes the word "add" stricken out, and in place the words "the party of the second part but at" inserted. Another modification being that "whenever the net annual earnings of the leased road shall not be sufficient to meet the annual interest on said bonds, the deficit shall be supplied and made up by the party of the second part."

He urges that if the net earnings of the Muskingum Valley Road are less than at present it will be entirely due to the action of the Pan Handle Co.; that at present the net earnings of the Muskingum Valley Co. are more than sufficient to meet the interest, and that traffic on all roads is increasing. He suggests further that the Pan Handle Co. should pay the interest itself rather than go through the useless formality of paying the amount to the treasurer of the Muskingum Valley Co.

He further urges that to allow a deficit to accumulate against the Muskingum Valley Co. for interest on bonds would open the door for selling out the stockholders of that company for the benefit of the Pan Handle Company.

Mr. Moran enclosed a copy of this letter of the twelfth of December, written to Mr. Scott, to Mr. Jewett, and on December 25th, Mr. Jewett wrote to Mr. Moran: "Not being familiar with the several interviews you have had with Colonel Scott, I don't know that I fully comprehend the scope of the changes you propose. The earnings of the C. & M. V. Co. are now fully equal to its present capacity with the present equipment upon it. To increase the earnings the capacity of the road must be increased by sidings and branches, depot buildings, etc., and the equipment largely increased; and I cannot see upon what principle the lessee could be expected to make these additions, improvements, and furnish the increased equipments, without being in some way compensated out of the increased earnings to be realized, because of such improvements, etc., and in being in some way secured for the investment thus made in the event of the lease being for any cause cancelled or forfeited," etc.

This resulted in another meeting of Mr. Scott and Mr. Moran, and as detailed by Mr. Moran in his letter to Mr. Churchill et al. on December 28th, he seems to have been satisfied by the explanation of Mr. Scott as to the terms of the lease relating to the advancements of money to pay interest.

He says: "Mr. Jewett, president of our company, as well as Colonel Scott, calls my attention also to the fact that to increase the earnings of your road requires additional outlays for sidetracks, equipment, etc., and that the lessee can not be expected to incur them if they

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are to be at his sole charge so long as the earnings are inadequate to defray them."

He says that Mr. Scott assures him that the sincere desire of the Pan Handle Co. is to develop the traffic of the Muskingum Valley Road, and that they will do everything in their power to do so; but that for the time being they cannot divert through traffic from their road over to it, "but this we can hardly expect them to do." And he and Mr. Scott seem to have agreed upon other modifications.

At a meeting of the stockholders of the Pan Handle Co. held on December 30, 1872, the president submitted the form of a lease of the Muskingum Valley Railway, and a resolution was passed ratifying and approving the lease upon the basis presented, and authorizing and directing the president or vice-president and secretary to execute the same, and confirming their action in the premises; and it was further resolved: "That if the board of directors of this company found it necessary to agree to any modifications of the said lease of the C. & M. V. Railway to obtain the assent of the C. & M. V. Ry. Co. thereto, such modifications shall be submitted to the next regular meeting of the stockholders of this company for their approval before the same shall go into effect."

A letter from Samuel Jeans was submitted, objecting to the lease.

The vote on the resolution was: In favor of the lease, 135,800 shares; against lease, 1,275 shares.

At this time the total stock of the Pan Handle Co. consisted of 168,671 shares, of which the Pennsylvania Company owned 75,576 shares, and the Pennsylvania Railroad Co. owned 60,009 shares. Of the shares voted for the resolution 135,585 shares were held by the Pennsylvania Company and the Pennsylvania Railroad Company.

On January 1, 1873, Messrs. Churchill and Fillmore, directors of the Muskingum Valley Co., wrote to Mr. Moran, expressing doubts as to the form of the lease and as to reliability to be placed on verbal explanations, and thereupon, on January 6th, Mr. Moran wrote to Mr. Scott in answer to a telegram, asking him to decide in regard to terms of lease, that he was most anxious to meet his views so long as it can be done without risk, etc. "As you state, the advances to be made by your company, if any, to meet the coupons of the first mortgage bonds of the C. & M. V. Ry. Co. are only to be repaid out of future earnings during the lease, and cannot lead to the sale of the road and franchises, I am willing to give up my objections to this stipulation, but I think it will be to the interest of both companies that your company shall directly attend to the payment of these coupons, instead of passing the funds through the hands of the treasurer of the C. & M. V. Co."

He suggests that all provisions as to arbitration be stricken out, leaving all parties to their remedies in court, and suggests that the legal organization of the Muskingum Valley Co. should be kept up, and provisions should be made for the expenses of doing so.

He then says, "I have thus given up nearly every stipulation for the protection of the minority interests of the shareholders of the C. & M. V. Co., placing my interest entirely in your hands, and must look to you and your company to so arrange the affairs of the road as not to make me regret the confidence I have placed in you."

The letter contains a postscript to the effect that the lease should express in clear language that the Pan Handle Co. shall only look to the future earnings for reimbursement of any advances it may make to meet

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the interest on the first mortgage bonds, and that they shall not have power to sell the road and franchises through any advances they may make for construction account.

At a meeting of the stockholders of the Muskingum Valley Co., held on January 9, 1873, in accordance with notice, the lease was submitted, and an amendment was made adding the words "and not otherwise" at the end of the second item, and a further amendment was made by which the lessor covenants to keep up and maintain its corporate organization, and by which the lessee agrees to advance not exceeding \$2,000.00 a year to defray the expense of maintaining the corporate organization of the lessor company, if the net earnings, after payment of interest, etc., are not sufficient. Thereupon the lease so amended was submitted to the vote of the stockholders, and 48,849 shares of stock were voted, all for the lease. It was thereupon resolved that the president of the company, under direction of the board of directors, be authorized to execute the lease and to do whatever other act was necessary to carry the same into effect.

At this time the total capital stock of the Muskingum Valley Co. consisted of 79,946 shares, of which the Pennsylvania Co. owned 48,618 shares; of the 48,849 shares voted in favor of the lease, the Pennsylvania Co. voted 48,618 shares.

At a meeting of the directors of the Pan Handle Co., held on March 17, 1873, a resolution was passed that the lease, so modified, be submitted to the stockholders at their annual meeting to be held on March 18, 1873, for their approval or rejection, and that upon said lease being approved by the stockholders, the president of this company be authorized and required to cause said lease to be executed in due form of law, and to do whatever else may be necessary to carry the same into effect.

At the annual meeting of the stockholders of the Pan Handle Co., held on March 18, 1873, the lease and the resolution of the directors of the Muskingum Valley Co., approving the lease in its modified form were submitted, and the stockholders proceeded to vote in favor or against the said lease, and 135,841 shares were voted for the lease, and no shares were voted against it. It was thereupon resolved, "That said lease be, and the same is, by virtue of said vote, hereby approved and ratified, and that the proper officers of this company, in pursuance of the resolution of the board of directors, proceed with the execution of said lease, and do any other matter or thing needful to carry the same into full force and effect, and that the lease be printed among the proceedings of this meeting.

Of the shares voted for said lease at this meeting, 135,576 were held by the Pennsylvania R. R. Co. and the Pennsylvania Co.

At a meeting of the directors of the Muskingum Valley Co., held on the — day of —, 1873, the proceedings of the previous meeting as to the lease and of the meeting of the stockholders as to the same were read, and the president reported that said lease had been amended as required by the stockholders, and as amended had been duly executed, and in accordance with the provisions thereof the possession of the road and property of this company had been delivered to such lessee and was then being worked and operated by the same, and it was thereupon resolved: "That the action of the president in the matter of executing the said lease and delivering the possession of the road and other property to the lessee is hereby approved."

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The lease was executed on the 25th day of March, 1873, by H. J. Jewett, president of the Muskingum Valley Co., and by William Thaw, vice-president of the Pan Handle Co., and attested by J. A. Lippincott, secretary of the Muskingum Valley Co., and W. H. Barnes, secretary of the Pan Handle Co. and duly acknowledged. The Pan Handle Co. went into possession of the leased road under the terms of the lease.

The lease is executed by the Muskingum Valley Co. as party of the first part to the Pan Handle Co. as party of the second part. It is for the term of ninety-nine years from January 1, 1873, and covers the entire line of road, together with all the depots, stations, buildings, appurtenances and property, real and personal, to said demised railway belonging and appertaining, and it provides, among other things, as follows:

"That in consideration of the premises, the party of the first part hereby covenants and agrees that the party of the second part shall at all times during the term aforesaid have full and exclusive power, right and authority to use, manage and work the said railway of said party of the first part, and shall have the right to fix the tolls thereon (but not at a higher rate than is authorized by the charter of the party of the first part thereto); and further, that said party of the second part shall have full, free and exclusive right to charge and collect all of the tolls on and freight charges and dues to accrue from said road during the said term, and to appropriate the same in the way and manner hereinafter mentioned, and shall have, use, exercise and enjoy all the rights, powers and authority aforesaid, and all other lawful powers and privileges which can or may be lawfully exercised and enjoyed on or about the said demised railway and property, as exclusively, fully, amply and entirely as the same might or could have been used, exercised and enjoyed by said party of the first part had this lease and contract not have been made, and as exclusively, fully, amply and entirely as said party of the first part have authority by law to grant the same.

"The party of the first part further covenants that it will keep up and maintain its legal and corporative organization, and, so far as it may be necessary to the full protection of the rights and interests of said second party, to permit the said party of the second part to use such corporative name and to act in and by virtue thereof; and in consideration of the premises the party of the second part hereby covenants to and with said party of the first part as follows, viz: First. That the party of the second part shall and will at all times during the hereby demised term, work, use, manage, maintain, operate and keep in use the railway of the party of the first part, with its appurtenances, from its point of connection with the railway of the party of the second part at or near Dresden, Muskingum county, Ohio, to its termination at Morrow, Warren county, Ohio, as aforesaid, and will so work and efficiently operate said railway and appurtenances between the said points, with all such locomotives, cars, and rolling stock owned, controlled or used by them, the party of the second part, as shall in the judgment of the party of the second part reasonably be required for and properly advanced to promptly and fully accommodate the business thereof, and shall and will collect and receive all of said tolls, freight charges, and dues which shall accrue as aforesaid and apply and appropriate the same in the way and manner following, to-wit:

First—The payment of the annual cost of repairing, maintaining and perpetuating for public use the railway property, and all the expenses

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of working, using, managing, maintaining and operating and running the same, including eight per centum per annum upon the cost of such engines as the party of the second part, at its own expense, may put on said road, and the usual charge for car service for cars actually running, used and employed thereon, and not owned by said first party, premiums for insurance, and all tolls, taxes, or assessments, now or hereafter to be levied or assessed by the laws of the United States or the state of Ohio upon the traffic passing over said road and the property of the said party of the first part now or hereafter acquired by the party of the second part by and under this lease. "It being distinctly understood that certain work yet to be done and required to perfect and completely finish the said road hereby demised, as well as such additions and improvements thereto as the parties of the second part shall determine to be necessary from time to time for the prompt and economical movement of the traffic on and over said road, shall be done by and at the expense of the said first party."

Second—To pay the surplus, if any thereafter remains, to the treasurer of the party of the first part provided, however, that in the event of the net earnings of the line of road hereby demised not being sufficient to protect the interest on the existing first mortgage bonds of the party of the first part as it matures, the party of the second part shall advance the needful means to pay the coupons at maturity, charging any such advance over the net earnings in open account to be returned out of the subsequent earnings, and not otherwise.

There is evidence to the effect that first mortgage bonds of the company were bought and sold on the faith of the stipulation contained in this lease with reference to the payment of the interest on the same.

I think the evidence shows that at the time the lease was executed the line of the road was in an inferior state of maintenance; the rails, ties, road bed, bridges, stations, buildings and shops were in, at all events, not a good condition, and repairs, additions and improvements were needed, and that the lessee expended about \$140,000.00 in making additions and improvements, consisting of new side tracks, extension of old side tracks, new freight and passenger stations, permanent bridges in place of temporary structures, in solid embankments in place of temporary trestles, in substitution of steel rails for old iron rail, etc.

The road so leased was operated by said Pan Handle Co. from the time it took possession, in 1873, during the succeeding years to and including the year 1884, with the result as follows: There was a net loss in each of said years of from \$18,000.00 to \$14,700.00, except the year 1879, in which year there was a net profit of \$5,142.00. The total net loss during said time amounted to \$953,570.00. The Pan Handle Company advanced the interest in each of said years on the bonds of the Muskingum Valley Co., and the amount so advanced is taken in consideration as money expended by the Pan Handle Co. in determining its net loss as aforesaid.

The \$140,000.00 expended for additions and improvements on said railroad was not repaid by the Muskingum Valley Co. and was counted in said net loss.

The road was operated during the year 1885 at a net loss of \$171,000.

Mr. Estep, at the instance and under the employment of Robert Sherrard and J. T. Brooks, officers and stockholders of the Pan Handle Co. (Mr. Brooks being the general counsel and Mr. Sherrard being a director), sought certain stockholders of the Pan Handle Co., informed

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them of the nature of the lease and the burden of the same on the company, and the advisability of having it declared void. Having obtained their employment, he formally represented to the Pan Handle Co. the burden of the lease and the fraud connected with its inception, and requested it to take steps to have it declared void; which the company formally re used to do. As a result, a petition was filed in the common pleas court of Jefferson county, by Samuel Jeans, the trustees of Cadiz township, the trustees of Rumley township, the trustees of German township (such townships being in Harrison county, Ohio), the trustees of Steubenville township, Jefferson county, Ohio, and the city of Steubenville, Jefferson county, Ohio, being holders of 6,870 shares of stock of the Pan Handle Co. against the Pan Handle Co. and the Muskingum Valley Co., to restrain the Pan Handle Co. from using or advancing funds of said company to pay interest on the bonds of the Muskingum Valley Co. due July 1, 1885; setting up that the contract of lease in its terms and operation was a hard, oppressive and unconscionable agreement, and a fraud on the rights of the plaintiff; that by the terms of the lease the lessee could derive no benefit from said lease or the earnings of the road, in any event; that the agreement was entered into under a mutual mistake of important facts; that the consideration of the lessees' covenants had entirely failed; that the circumstances under which the lease was entered into constitute a fraud on the rights of the plaintiff and minority stockholders, and render said lease illegal and void, and asking that the Muskingum Valley Co. be enjoined from attempting to enforce said lease and agreement until final hearing, and that upon such hearing said lease and agreement may be brought into court, declared null and void, and cancelled, and that all further operation thereunder by either party be enjoined; and especially that the Pan Handle Co. be perpetually restrained from using the funds of said company to make any further advances of interest on said bonds, for the operation and maintenance of said leased road, or otherwise, under said lease and agreement, and for such other and further relief as may be equitable and proper.

The Muskingum Valley Co. filed a demurrer, but, not withdrawing the demurrer, the attorney withdrew from the case, under the direction of the vice-president of the company. The Muskingum Valley Co. filed an answer which practically admitted the averments of the petition.

Thereupon the case came on for hearing, and on November 24, 1885, a decree was entered finding that the allegations of the petition were true, and that the plaintiffs were entitled to the equitable relief prayed for, and decreeing that the said lease "be and the same hereby is vacated, set aside and declared null and void," and ordering that the Pan Handle Co. deliver up to the Muskingum Valley Company the said railway property, etc., on or before January 1, 1886, and that said Pan Handle Co. be enjoined from operating said railway under said lease, etc., and from advancing any funds for the purpose of paying interest on the bonds of said lessor, or for operation and maintenance of said railway; and enjoining said Muskingum Valley Co. from enforcing said lease, etc.

On December 10, 1885, Evan J. Henry was made a party defendant and filed an answer, and thereupon gave notice of an appeal of the case to the circuit court. His appeal was perfected on the fourteenth day of December, 1885.

On December 28, 1885, J. N. McCollough, vice-president of the Pan Handle Co. addressed a communication to the Muskingum Valley Co.,

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notifying them of the decree in the Jefferson county common pleas, reciting its provisions, and saying :

"You are hereby notified that on the first day of January, 1886, this company will be ready to comply with said decree so far as the same relates to the surrender of the demised property to the owner thereof, and hereby request that arrangements be made without delay for the transfer of said property with the least possible inconvenience in so doing ; and that concurrent action be taken for making an inventory of the property so to be delivered to the lessor company, and for the purpose of agreeing upon the value thereof."

At a special meeting of the board of directors of the Pan Handle Co., held on February 10, 1886, this communication addressed by the vice-president of the company to the Muskingum Valley Co., was submitted, and the action of the vice-president therein was approved, ratified and confirmed.

At a meeting of the directors of the Muskingum Valley Co., held on December 30, 1885, Messrs. Messler, Churchill, Graham and Herdman were present. The president thereupon presented the decree of the court of Jefferson county in the Jeans case, also the notice which had been sent to said company by the vice-president of the Pan Handle Co. in regard to said decree as above stated.

Thereupon a resolution was passed as follows :

"Resolved, That in obedience to the decree of the court of common pleas of Jefferson county, Ohio, in the suit of Samuel Jeans et al. v. Pittsburgh, Cincinnati & St. Louis Ry. Co., and the Cincinnati & Muskingum Valley Ry. Co., and in conformity with the notice dated December 28, 1885, served on this company by the Pittsburgh, Cincinnati & St. Louis Ry. Co., to the effect that they would be prepared on and after January 1, 1886, in accordance with the decree referred to, to surrender control to the Cincinnati & Muskingum Valley Ry. Co. of its railroad and other property heretofore leased to them, the president be and he is hereby authorized and directed to have issued and published notice in the form following, to-wit :

CINCINNATI & MUSKINGUM VALLEY RAILWAY COMPANY,
ZANESVILLE, OHIO, December 30, 1885.

Notice is hereby given that on the first day of January, 1886, the Cincinnati & Muskingum Valley Railway Company will resume possession and control of its entire railway, and will operate the same in its own name and by its own employees from and after the date above named. All persons heretofore employed by the Pittsburgh, Cincinnati & St. Louis Railway Company directly in connection with the Cincinnati & Muskingum Valley Railway will continue to discharge the duties assigned to them unless heretofore otherwise specially ordered.

By order of the Board of Directors.

(Signed.) THOS. D. MESSLER,
President.

At this meeting the following officers were elected: F. G. Darlington as secretary; John E. Davidson as treasurer; John W. Renner, auditor; G. W. Davis, general freight and ticket agent; and John H. Brasee, solicitor. Mr. Darlington had been connected with the management of the Pan Handle Co. and the Muskingum Valley Co. prior to January, 1886.

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Mr. Davidson was also the treasurer of the Pan Handle Co. and of the Pennsylvania Co.

Mr. Renner was also the comptroller of the Pan Handle Co. and of the Pennsylvania Co.

Mr. Messler, the president of the company, was the third vice-president of the Pan Handle Co. and of the Pennsylvania Co.

Mr. Messler as president, Mr. Davidson as treasurer, and Mr. Renner as auditor of said Muskingum Valley Co., had their offices in Pittsburgh.

On January 1, 1886, these officers took charge of the road and commenced the operation thereof, and continued to operate the same in the name of the Muskingum Valley Co. The work had been done at Pittsburgh and Columbus in connection with the operating of the road, except that part of the work under the immediate control of the president was transferred to Zanesville. The superintendent and the operating officer in charge had, prior to January 1, 1886, reported for instructions to the general superintendent of the Pan Handle Co.; after that date he reported to and received instructions from the president of the Muskingum Valley Co.

Mr. Darlington acted as the superintendent, and appointed an engineer of maintenance of way and a train master.

An inventory was taken of the rolling stock, etc., as of January 1, 1886, containing a comparative statement to show an inventory of the rolling stock, etc., on hand at the time the road was leased. This showed a deficiency which was supplied at the request of the Muskingum Valley Co.

After January 1, 1886, a number of contracts were made in the name of the Muskingum Valley Co. for the use of its tracks, etc., with other railway companies; property was condemned by the company, and sales and purchases of real estate were made by it.

At the annual meeting of the stockholders of the Muskingum Valley Co., held March 23, 1886, the following directors were elected: Thomas D. Messler, G. B. Roberts, Charles Moran, James Buckingham, M. Churchill, W. A. Graham and James Herdman. The report of the directors for the fiscal year ending December 31, 1885, was approved. The vote is not shown, but the whole number of shares voted at this meeting for the election of directors was 48,743.

In the report so approved the directors give a statement of the case of Jeans against the company in the Jefferson county common pleas court, and of the decree, and say that under this decree the Pan Handle Co. gave formal notice under date of December 29, 1885, "that in obedience to such decree it would be prepared to deliver the road and equipment on January 1, 1886. This was done, and your company has been since operating the road in its own name."

Of the directors of the Muskingum Valley Co., Mr. Messler was also the vice-president of the P., C. & St. L. Ry. Co., and third vice-president of the Pennsylvania Co. George B. Roberts had been a director of the Pan Handle Co. Mr. Buckingham was the owner of twenty shares of stock in the company. Mr. Churchill was the owner of twenty-five shares; Mr. Graham was the owner of thirty-five shares, and Mr. Herdman was the owner of twenty shares.

At the annual meeting of the stockholders of the Muskingum Valley Co., held on March 22, 1887, the directors reported that under a decree of the Jefferson county common pleas court, given in November, 1885, the lease of the road was annulled, and in accordance with the decree the

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road, etc., was delivered by the lessee to the Muskingum Valley Co. on January 1, 1886, and has since said date been operated in its name and by its officers.

This report was approved. The vote is not shown, but the whole number of votes cast at the election of directors at this meeting was 48,754 shares.

On September 9, 1885, Charles Moran, as trustee and in his own behalf and that of the holders of bonds of the Muskingum Valley Co. secured by mortgage, filed his bill in equity in the circuit court of the United States for the Southern District of Ohio against the Pan Handle Co., the Muskingum Valley Co., Samuel Jeans and the other plaintiffs in the case in Jefferson county common pleas; setting out the said mortgage executed on September 1, 1870, by the Muskingum Valley Co. to him and J. Edgar Thompson, and to the survivor of them; that Thompson was dead; that said mortgage was executed to secure the payment of 1,500 bonds of \$1,000.00 each; that the complainant was the holder and in his own right owned more than 400 of said bonds, and that other persons and corporations, including the Pennsylvania Co.—which Pennsylvania Co. is the holder of more than three-quarters of the stock of the Pan Handle Co.—are the holders and owners of the residue of said bonds, said Pennsylvania Co. being the holder and owner of a majority, viz.: 752 of said bonds, and 8-13 of the stock, of the Muskingum Valley Co., and the complainant further sets up the lease by the Muskingum Valley Co. to the Pan Handle Co. and sets out the terms of the lease and makes a copy thereof a part of the bill, and further, that the lease went into full operation, and to June 30, 1885, all the terms thereof had been kept, and that “said lease and the performance thereof had been accepted by this complainant and by all the holders of said first mortgage bonds as an additional and further muniment of title, and ratified and adopted by them, and that the said lease and contract constitute a valuable muniment of title, as part of the estate and property mortgaged to the complainant.” That all the coupons maturing upon the bonds until June 30, 1885, had been paid by said lessee to said bondholders through the agency of the complainant, except the coupons on bonds held by the Pennsylvania Co., which were settled between said company and the lessee; that faith and credit have thus been given to said bonds; that the suit brought by Jeans and others was a collusive scheme instigated by the lessee to terminate the lease; that the interest due on said mortgage bonds upon the first day of July, 1885, was not paid and was then in default; and that by such default the condition of defeasance of said mortgage had been broken and the estate of said mortgagee in said premises, including the rights of said mortgagor or lessor under said lease, has become absolute in law; that the Muskingum Valley Co. was insolvent, and that its property, irrespective of said case, is not of sufficient value to pay such mortgage bonds, and that the only method whereby the rights of the complainant could be secured to him is by the collection of said rents and the sale of said property with the benefit of said lease and contract, and the right to receive the annual rental for the term of said lease, in accordance with the provisions of said lease.

And the complainant prayed “for the appointment of a receiver to take possession of and collect the rental aforesaid, payable by the Pittsburgh, Cincinnati & St. Louis Ry Co. to the Cincinnati & Muskingum Valley Ry. Co., under and by virtue of the provisions of said lease during

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the pendency of this suit, and that upon the final decree it may be held and established, notwithstanding said collusive suit and anything done therein, that the said lease and contract in equity belong and appertain to the holders of said mortgage bonds and to this plaintiff, as their trustee, as a muniment and part of their title, and that said lease and contract are valid, and that said holders and this complainant are entitled to enforce the same and to collect said rents as security for said bonds, and that all the estate and reversion of the lessor in said railway property, with the benefit of the lease aforesaid and the right to receive the rents accruing upon said lease and to enforce the performance of its covenants, may be sold and disposed of by a master commissioner to be appointed by this court, but without dispossessing the said lessee company of its possession or any of its rights under said lease, and for such other and further relief as in equity and good conscience the complainant may prove to be entitled to."

To this bill the Pan Handle Co. filed an answer on October 31, 1885, in which it admits the execution of the mortgage in the bill mentioned, and the issuing of the bonds. It admits the execution of the lease by the Muskingum Valley Co. to the Pan Handle Co., and that the Pan Handle Co. took and had possession thereof to the then present time. It set out that the lessee had advanced about \$140,000.00 for additions and betterments of the road, which the lessor had failed to repay, and that the lessor is unable to repay the same. It denies that the lease is a muniment of title as part of the assets mortgaged to the complainant, or that it was accepted by the holders of the bonds or ratified and adopted by them as such muniment of title, and it avers that the bondholders have no interest in said lease, and have nothing to do in relation thereto, except to receive interest on the bonds. It denies that the interest was paid by the lessee to the bondholders, but says it was advanced to the lessor company. It sets out that the lease had been a burden to the lessee; that it had been compelled to advance \$140,000.00 for additions and betterments, and \$800,000.00 to protect the interest on the bonds contrary to expectations. It denies that the Jeans suit is a collusive suit.

On November 27, 1885, Samuel Jeans and the other plaintiffs to the Jefferson county suit, filed an answer setting up matters to the same effect as in the answer of the Pan Handle Co., and further, that said contract of lease in its terms and operations, is a hard, oppressive and unconscionable agreement, and a fraud upon the rights of the respondents; that the agreement was entered into under a mutual mistake of important facts; that the consideration for the lessee's covenants has failed; that the circumstances, influences and means by which said agreement was brought about constituted a fraud on the rights of the minority of stockholders, and render it void; and further set up the suit in Jefferson county, and that on November 24, 1885, a decree had been entered in said case vacating and setting aside said lease and decreeing the same to be null and void.

And on December 8, 1885, the Pan Handle Co. filed a supplemental answer setting up the decree in the case in Jefferson county.

On February 1, 1886, the complainant filed an amended and supplemental bill setting up that the interest falling due January 1, 1886, was due and unpaid, and further that the collusive suit in common pleas court of Jefferson county had proceeded to judgment without opposition on behalf of said Railway Company, except of a simulated and unreal

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character, and that Evan J. Henry, a stockholder of the Muskingum Valley Co., had appealed the case in Jefferson county common pleas to the circuit court, and asking that the Pan Handle Co., in addition to the relief prayed for in the original bill, may be restrained from asserting the suit in Jefferson county, or any judgment therein, by way of a defense in any action at law which may be brought upon said lease or upon said coupons, or to enforce the performance of any legal duty entered into between said railway companies.

To this the Pan Handle Co. filed an answer setting up that said case was defended by it, but that the president of the Muskingum Valley Co. had notified Charles Moran of the pendency of said suit, but that he failed to co-operate in its defense, and that the Muskingum Valley Co., having no means, therefore directed its attorney to give the suit no more attention, and denying that an appeal was perfected by the proceedings taken by said Henry.

Jeans and the other stockholder also filed an answer setting up in substance the same matter as contained in the answer of the Pan Handle Co.

The complainant filed a second supplemental bill setting up the accrual of other interest; that the appeal in the Jeans case had been dismissed in the circuit court of Jefferson county; that a petition in error had been filed in the Supreme Court of Ohio, and a supersedeas bond given whereby said dismissal was wholly superseded.

The Pan Handle Co. filed an answer admitting the appeal and supersedeas, but averring that the judgment of dismissal was in full force. Jeans et al filed a similar answer.

The case was heard by Hon. Howell E. Jackson, circuit judge, on the evidence, and in rendering his decision, Judge Jackson states the following as his conclusions:

"First—That said lease having been executed subsequent to the mortgage, no privity of estate or contract was thereby created between the mortgagee and lessee; and it is the well settled rule, both in this country and in England, and in as much as no reversion vests in the mortgagee under such circumstances, he can not distrain or bring an action, either at law or in equity, for the rents payable by the tenant, nor is he entitled to enforce the covenants and provisions of the lease. He has no election, either before or after the mortgagor's default, to adopt and demand the benefits of the lease without the consent of the lessee. His remedy is to foreclose upon default of the mortgagor, to take possession of the premises, and thereby place himself in position to obtain the future profit. Either step operates as an eviction of the tenant by title paramount, and leaves him at liberty to terminate the lease and quit.

"Two—That under the facts of this case there has been no attornment, actual or constructive, nor any equitable equivalent therefor by the lessee to the mortgagee so as to change the above rule, and his court has no power to compel such an attornment by the lessee, either to the mortgagee or the purchaser, under the foreclosure proceedings. The relation of the landlord and tenant, as between the mortgagee and lessee, can only arise by the mutual agreement and consent of the parties.

"Third—The lease in question does not come within the description of the property, rights or franchises covered by the mortgage, nor is it in any sense 'after acquired property' within the meaning of these terms as used in said mortgage. Even if the income, rents and profits of the

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road had been covered by the mortgage the personal covenant of the lessee to make 'advances' as provided in the lease could not be treated as 'income,' of the road or as a part of the franchises of the mortgagor. The subject of 'after acquired property' under mortgages containing similar provisions and clauses, has often been before the Supreme Court, but no case yet decided has gone to the extent of holding that personal contracts or covenants entered into with the mortgagor or by third parties subsequent to the mortgage, and under which no new estate is acquired by the mortgagor, come with those terms.

"Fourth—But if the lease were otherwise free from objection, if it was still in force as between lessor and lessee, and if it came within the description of the property, rights and franchises covered by the mortgage, so that complainant had precisely the same right to claim the benefit of its provisions which the mortgagor had (and certainly his rights could in no event rise higher than the mortgagor's), still this court would not compel the lessee to specifically perform the provisions of said lease or enforce the lessee's covenant to make advances beyond the net earnings of the demised road sufficient to pay the interest on the lessor's bonds, and leave it to look alone to the future earnings of an insolvent road for its reimbursement, because the enforcement, of that agreement would be grossly inequitable, unreasonable, hard, oppressive on the lessee, and without any equivalent consideration, past, present or prospective, and because the lessor, to whose rights the complainant claims to have succeeded, is in default for large sums due the lessee, and which the complainant makes no offer to pay.

"Fifth—The mortgagee, not being a party or interest in or entitled to the benefits of said lease and the covenants therein contained, and the lessee never having attorned to him, was not a necessary party to the suit of Samuel Jeans et al., in Jefferson common pleas, for the cancellation and annulment of said lease. The decree in that suit is conclusive on both parties to the lease, the lessor and the lessee, and it is wholly immaterial whether it was instituted at their suggestion or not. The lessor and lessee could themselves have vacated and terminated said lease by mutual agreement at any time."

Thereupon a decree was entered in the case dismissing the original and amended and supplemental bills as against the Pan Handle Co., Samuel Jeans and all defendants, other than the Muskingum Valley Co., and finding that the complainant is entitled to a decree against the Muskingum Valley Co., foreclosing its equity of redemption under the mortgage for the sale of the property specifically described in said mortgage, as though the lease mentioned in the bill of complaint had never been made or entered into, and such decree was accordingly ordered on the usual terms; but the formal entry of the decree was ordered to be postponed until after the complainant shall have taken an appeal against all the defendants, except said Muskingum Valley Co., and said appeal shall have been heard and determined, and the complainant prayed an appeal from the decree for dismissal, which was allowed.

The appeal was perfected, and the case taken to the Supreme Court of the United States.

At the annual meeting of the stockholders of the Muskingum Valley Co., held on March 27, 1888, the directors made a report as to the decree in the Moran case, and saying that the court declared "in effect that the lease was unconscionable in its character, inequitable in its provisions, and therefore should not longer be upheld against the Pitts

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burgh, Cincinnati & St. Louis Ry. Co." This report was approved. The vote is not shown, but the whole number of shares voted for directors at this meeting was 48,754.

At the annual meeting of the stockholders of the Muskingum Valley Co., held on March 22, 1892, a communication was submitted from Moran Bros., in regard to the case of Jeans et al., in Jefferson county, in which they offer to furnish counsel to take charge of the defense of the case and collect the rentals in arrears at their own expense.

A resolution offered to accept said offer was referred to the incoming board of directors. It does not appear that further action was taken on this resolution.

At this meeting the following directors were elected: Messler, Roberts, Moran, Buckingham, Churchill, Graham and Herdman. Roberts and Moran did not qualify, however. All the shares of stock represented at this meeting, viz., 75,459 shares, including the stock of Moran Bros., viz., 26,750, were voted for these directors.

At this time the Pennsylvania Co. must have owned about 48,612 shares of this stock: it owned 48,618 in 1873 and 48,612 in 1893.

The plaintiff in the case of Jeans et al. v. The Pittsburgh, Cincinnati & St. Louis Railway Company et al., pending in the circuit court of Jefferson county, dismissed their action on November 22, 1892.

On January 4, 1893, at a meeting of the board of directors of the Muskingum Valley Co., the following directors were present: Messler, Churchill, Graham, Herdman and Buckingham. A communication was received from Moran Bros., calling the attention of the board to the fact of the dismissal of the Jeans case, in Jefferson county, and claiming that the acceptance by the Muskingum Valley Co. of the surrender to it by the Pan Handle Co. of the railroad and property theretofore leased by the Muskingum Valley Co. to the Pan Handle Co. was illegal, and that there was no longer any claim that the lease was not valid and binding, and demanding that the board of directors of the Muskingum Valley Co. at once cause the Pan Handle Co. to be repossessed of the said road and property, and require it to pay the eleven past due coupons to the bondholders of the Muskingum Valley Co., or to advance the sum necessary to pay the same. Thereupon the said directors, reciting the said letter and the decisions and the judgment in the Moran case in the United States court, and that the said Muskingum Valley Co. had not been able to perform its covenant in said lease as to additions and improvements, and that said company was in 1885 and ever since and for years prior thereto was, has been, and still is insolvent, and wholly unable to furnish such additions and improvements, and that the earnings of said road had for many years been insufficient to maintain and operate it and pay the interest on its mortgage bonds, and that the Pan Handle Co. had before January, 1886, advanced to this company more than \$900,000.00 to protect the interest on said bonds, and that no part thereof had been or would probably ever be returned to it, and that it was the opinion of the members of the board that it would be useless and unconscionable on the part of this company to insist upon the further performance by the Pan Handle Co. while the company was in default and unable to perform its covenant; and that under these circumstances, on January 1, 1886, the Pan Handle Co. surrendered said leased property to this company, and this company resumed possession and control thereof, and ever since January 1, 1886, both companies have regarded and treated said lease as surrendered and terminated, and this company has had

possession and control of said road and operated the same; and that this board does not regard its action in accepting the surrender of said railroad and property and terminating said lease as illegal; and that this board is unable to perceive any benefit to the holders of stock of this company from any attempt to resuscitate said lease, and that the bondholders have litigated in said suit in the U. S. court all their claims to rights under said lease.

"Resolved, That it is the opinion of this board that it is not its duty to attempt to revive said lease, or to cause the Pittsburgh, Cincinnati & St. Louis Ry. Co. to be repossessed of said railroad and property or to require it to pay the past due coupons in default to the bondholders of this company, or to advance the sum necessary therefor.

"Resolved, That in the opinion of this board it is equitable that said lease should be, and the same is hereby rescinded so far as it is within the power of this board to rescind the same.

"Resolved, That a certified copy of the foregoing preamble and resolutions be sent by the secretary to the directors of the Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. for such action thereon as may be deemed best to be taken by said directors; also that a certified copy of said resolutions be sent the Moran Brothers."

The directors testify that the matters set out in the preamble and resolution adopted at this meeting were true; that they acted on their own judgment to the best interest of the Muskingum Valley Co.; that neither the Pan Handle Co., the Pennsylvania Co., the Pennsylvania Ry. Co., nor any officer of either of said companies dictated to them or attempted to prevent the exercise of their own judgment in such matters.

At the annual meeting of the stockholders of the Muskingum Valley Co. held on March 28, 1893, the resolutions so adopted by the board of directors of said company on January 4, 1893, were submitted to the stockholders, and thereupon the following resolution was passed:

"Resolved, That the action of the board of directors of this company, as indicated in the resolutions adopted by them on January 4, 1893, in cancelling and declaring void the lease heretofore executed, between the Cincinnati & Muskingum Valley Ry. Co., and the Pittsburgh, Cincinnati & St. Louis Railway Company, dated December, 1872, to take effect January 1, 1873, be, and the same is hereby approved, ratified and confirmed."

The holders of 75,439 shares were present, or represented, at this meeting, and the vote on said resolution was as follows: 48,689 shares were voted in favor of, and 26,750 shares voted against the adoption of said resolution. The votes cast against the resolutions were on the proxy of Moran Brothers. The total stock of the company at this time consisted of 79,946 shares, of which the Pennsylvania Co. owned 48,612 shares. The shares voted for the resolution, to-wit.: 48,689 shares, represented more than a majority, but less than two-thirds of the entire capital stock of the company outstanding, and represented a majority, but less than two-thirds of the holders of stock represented at said meeting and voting thereat.

A resolution directing the directors to surrender the possession of the property of this company to the Pan Handle Co., lessee, and to require said company to proceed and perform the obligations of the lease by operating the road, advancing the money, etc., was defeated by a vote of 26,750 shares cast for, and 48,689 shares cast against its adoption.

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At this meeting the following directors were elected: Messler, Davidson, Brooks, Herdman, Graham, Churchill and Buckingham. The stock of Moran Bros. was voted with the other stock represented at the meeting, for these directors.

At a meeting of the directors of the P., C., C. & St. L. Ry. Co., the successor of the Pan Handle Co., held on January 5, 1893, the resolutions adopted by the board of directors of the Muskingum Valley Co. on January 4, 1893, was submitted, and thereupon the following resolution was passed:

"Resolved, That the formal approval and consent of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway, successor of the Pittsburgh, Cincinnati & St. Louis Ry. Co., to the rescission of said lease is hereby given; and said lease is hereby declared to be wholly rescinded and cancelled, so far as the P., C. & St. L. Ry. Co. and the P., C., C. & St. L. Ry. Co. or either of them is concerned.

"Resolved, That a certified copy of the foregoing minute be sent by the secretary of the company to the secretary of the C. & M. V. Ry. Co."

At the annual meeting of the stockholders of the P., C., C. & St. L. Ry. Co., held on April 11, 1893, the resolutions adopted by the board of directors of said company on January 5, 1893, above given, were submitted to the stockholders, and thereupon the following resolution was adopted:

"Resolved, That the action of the directors of this company in giving formal approval and consent of this company to the cancellation of said lease, and declaring said lease wholly rescinded and cancelled so far as the Pittsburgh, Cincinnati & St. Louis Railway Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company are concerned, be, and the same is hereby approved and ratified."

Said resolution was adopted by the following vote: 336,598 shares were voted for said resolution, and no shares were voted against it. The shares so voted for said resolution represented more than two-thirds of the entire capital stock of the P., C., C. & St. L. Ry. Co. outstanding.

At this time the total capital stock of the P., C., C. & St. L. Ry. Co. consisted of 464,083 shares, of which the Pennsylvania Railroad Co. owned 46,519 shares, and the Pennsylvania Company owned 276,643 shares.

The appellant in the case of Moran v. The Pittsburgh, Cincinnati & St. Louis Ry. Co. et al., pending in the Supreme Court of the United States, appear in court on October 17, 1893. And on his motion the appeal was dismissed.

During the years 1886 and 1893, both inclusive, the Muskingum Valley Ry. Co. was operated at a net loss of from \$49,000.00 to \$122,000.00 each year, counting the interest on the bonds as part of the expense; and during the year 1894 the road was run at a net loss.

Additions and improvements were made to the railroad as follows:

In the year 1886 the amount of.....	\$16,600 00
In the year 1887 the amount of.....	16,003 00
In the year 1888 the amount of	17,700 00
In the year 1889 the amount of.....	19,300 00
In the year 1890 the amount of.....	25,800 00
In the year 1891 the amount of.....	9,600 00
In the year 1892 the amount of	18,700 00
In the year 1893 the amount of.....	10,600 00
In the year 1894 the amount of.....	10,900 00

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A further sum aggregating over \$100,000.00 was expended during these years for new steel rails.

These amounts so expended for additions and improvements are counted as expense in determining the net loss above given.

The coupons maturing on the said mortgage bonds of the Muskingum Valley Co. on January 1, 1886, were paid in November, 1886; those maturing on July 1, 1886, were paid in December, 1891; those maturing on January 1, 1887, were paid in December, 1892, and those maturing on July 1, 1887, were paid in March, 1895. The payment of the coupons maturing July 1, 1887, was made after the petition was filed in this case. On the payments being made, as aforesaid, the coupons were surrendered by the holders, cancelled and filed in the office of the Muskingum Valley Co.

OPINION.

SAYLER J.

The plaintiff, Evan J. Henry, who sues in his own behalf and in behalf of all other stockholders of the Cincinnati & Muskingum Valley Ry. Co., who may see fit to join in the prosecution of this action and contribute to the expense thereof, brings the action against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co. and the Cincinnati and Muskingum Ry. Co. (and hereinafter for convenience called the Muskingum Valley Co.), setting up that he is and has been since 1870 the owner of 550 shares of the stock of the Muskingum Valley Co.; that the P., C., C. & St. L. Ry. Co. is the successor, by consolidation, of the Pittsburgh, Cincinnati & St. Louis Railway Company, with its line of road extending through Dresden Junction, etc., and the Chicago, St. Louis & Pittsburgh R. Co., with its line of road, etc.; that the Muskingum Valley Co. was the owner of the line of railroad from Dresden Junction to Morrow, and averring that the Pennsylvania Railroad Co. held control of the Pittsburgh, Cincinnati & St. Louis Railroad Co. (and hereinafter for convenience called the Pan Handle Co.), and the Muskingum Valley Co., through the majority of the stock of said companies owned or controlled by it; setting up the bonds issued by the Muskingum Valley Co., secured by mortgage on the line of road of said company; the payment of the coupons on said mortgage to and including those maturing on January 1, 1887; the maturity of the coupons maturing since the first of January 1887, which remain unpaid; the lease executed by the Muskingum Valley Co. to the Pan Handle Co., and the possession taken by and the occupation of the lessee of the said road under said lease; and the advancement by the lessee under the provisions of the lease of the money to pay the coupons on said bonds to July, 1885; with a statement as to the Jeans suit in Jefferson county, and the subsequent transactions of the lessor and lessee with reference to the road and lease claiming that the suit was not brought in good faith, that the defense made was a sham, and that by the dismissal of the Jeans suit the lease was left in full force and effect, and further claiming that the act of the directors of the Muskingum Valley Co., of December 30, 1885, was in the interest and at the instigation of the Pennsylvania Co. and of the lessee, and not in the interest of the lessor, and that the same was a pretended surrender of the railroad; that the railroad continued thereafter to be operated by the officers and agents appointed by the lessee and in the interest of the lessee. That on March 22, 1892, Moran Brothers,

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stockholders of the Muskingum Valley Co., acting for the plaintiff as well as in their own interest, made a demand upon said company at the annual meeting of the stockholders to take action to enforce the said lease and to compel the payment of the sums agreed to be advanced, and to that end prepared and submitted resolutions providing for such action, which were referred by the stockholders to the board of directors, but the board of directors refused to take action. That on January 4, 1893, the plaintiff, by Moran Bros., having further made demand upon the directors of said Muskingum Valley Co., that they should at once cause the Pan Handle Co. to be repossessed of the railway of the said Muskingum Valley Railway Co. under the terms of said lease, the said directors by resolution refused to take any such action, and refused to take any steps to enforce said lease.

Wherefore the plaintiff says it is impossible to procure said Muskingum Valley Co. to take any action towards the enforcement of said lease, inasmuch as the said company is controlled by and acts under the direction of said Pennsylvania Co. and the said Pan Handle Co., which companies are controlled by the Pennsylvania Railroad Co.

Wherefore the plaintiff prays "that the validity, obligation and binding force of the said lease as against the said Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co., may be established by the judgment of this court; that the said company may be repossessed of the said demised premises, and compelled, during the residue of the term of said lease, to maintain and operate the demised premises at its own proper cost, expense and risk, and so to save the Muskingum Valley Co. and its stockholders harmless therefrom; that judgment may be rendered against the said Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. for the amount of the said coupons so in default and the interest thereon, and the interest on the said coupons which have been paid at dates later than the dates of maturity, and that said sums of money may be collected and distributed by the judgment of this court among the proper parties, holders of said bonds and coupons, who may appear to be entitled thereto by proof taken before a commissioner appointed by this court or otherwise, as to this court may seem best, and that the said last named company may be compelled hereafter to advance to the Muskingum Valley Company from time to time, as the same may mature, all moneys necessary for the payment of said coupons as they mature until the maturity of the principal sum due and secured upon said mortgage aforesaid, and that, in all things, the said Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company may resume and be compelled to continue performance of the obligations and agreements of said lease until the end of said demise, and for such other and further relief as in equity and good conscience this plaintiff may, upon final hearing of this cause, prove to be entitled to."

Charles Moran, Daniel Comyer Moran and Amelia D. Moran, partners under the firm name of Moran Bros., file an answer and cross-petition, setting up that they are shareholders of the Muskingum Valley Co. since 1870, as individuals and trustees, to the number of 28,250 shares; they admit the averments of the petition, and ask that they may be taken to have been made by them as fully and completely as if they were recited and fully set out in their answer and cross-petition, and they join in the prayer of the petition.

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The Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. files an answer, putting in issue the allegations of the petition, and setting up defenses to the action of the plaintiff.

The Muskingum Valley Co. files an answer, adopting the allegations, etc., of the answer of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

It would seem that by reason of the demand made on the Muskingum Valley Co. to take action to enforce the lease and to compel the payment of the sums agreed in said lease to be advanced, and the refusal of said company to comply with the demand of the plaintiff, with whom Charles Moran et al. join in a cross-petition, may maintain this action in behalf of himself and his co-stockholders, for the purpose of asserting the rights of the corporation. 18 Howard, 331; 18 Wallace, 626.

Provided the action "be a bona fide one, faithfully, truthfully, sincerely directed to the benefit and interest of those shareholders whom the plaintiff claims a right to represent." *Forest v. Ry. Co.*, 4 De. Gex. F. & J. 126, 130.

In that case the court found that the plaintiff was a shareholder in a rival company, and brought the suit by direction of that company, who indemnified him against costs; that he was a puppet of that company, and therefore could not maintain the action.

And to the same effect are the cases in 54 Penn. St., 402; 1 Hemming & Miller, 489; 8 Law. Rep. Eq. Cases, 301.

It appears that the plaintiff is a bondholder, and that if this suit is successful, interest will be paid on his bonds. This interest in the matter certainly does not show mala fides on his part in bringing the suit under the rule laid down in *Forest v. Ry. Co.* supra.

If it be true that the lease is still in force as claimed by the plaintiff, the rights of the company with reference to the lease are involved, and the company, refusing to take steps to protect them, the plaintiff may maintain the action; but only to enforce the corporate right, not the individual rights of the plaintiff. 1 Morawetz on Corporations, 2 ed. sec. 271.

The company certainly has a great interest in the action; its continued existence would seem to depend on the result. Yet it is contended by the defendant that the stockholders have no interest in the matter; that the action can in no way benefit them. I cannot appreciate this argument. The stockholder has an interest in the continued existence of the company and in the payment of its debts. It is true he is not liable on the bonds or for the coupons, but by the payment of the coupons, the property of the company is relieved from the debt and becomes more valuable to the corporation, consequently to the shareholder.

I think the evidence shows a combination of the Pan Handle Co. and Muskingum Valley Co. through the Pennsylvania Railroad Co. to cancel the lease, which presents a case of equitable jurisdiction for specific performance of the obligations of the lease. *Penn. Co. v. St. L., A. & T., H. R. R. Co.*, 118 U. S., 290.

It is claimed by the defendants that the decree of the circuit court of the United States in the action brought by Charles Moran to foreclose the mortgage is, as to all questions, litigated and decided in said cause, binding and conclusive on the Muskingum Valley Co. and all of its stockholders.

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The bill in the United States circuit court was filed by Charles Moran, as surviving trustee under the mortgage executed by the Muskingum Valley Co. and in his own behalf and that of the holders of bonds of the Muskingum Valley Co. secured by said mortgage for the purpose of foreclosing said mortgage, and claiming said lease to be in full force and covered by said mortgage under said lease to the payment of the bonds secured by said mortgage.

This action is brought by Evan J. Henry, an owner of capital stock of the Muskingum Valley Co., in his own behalf, and also in behalf of all other stockholders of the company who may see fit to join in the prosecution of said action and contribute to the expense thereof, for the purpose of enforcing the rights of the company under the lease—the company itself refusing to act—and Moran Brothers, as stockholders of said company, by a cross-petition, join in the relief prayed for.

The plaintiff cites Bigelow on Estoppel (4 ed. 123, 5 ed. 180), which lays down the rule that :

“Judgments, as a general rule, conclude the parties only in the character in which they sue or are sued,” etc.

This is quoted and affirmed in 99 Ind. 496. Also in 102 Ind. 27. In 58 N. Y. 463, it is laid down that :

“A judgment against a party sued as an individual is not an estoppel in a subsequent action in which he sues or is sued, in a representative capacity.”

And in 45 Cal. 444, the court say :

“In order to determine if the former judgment can be availed of as a bar in a subsequent suit, we must inquire whether the former litigation was between the same parties in the same right or capacity litigating in the subsequent suit,” etc.

In the Moran case the issue was as to the right of the mortgagee to subject the rights of the Muskingum Valley Co. in the lease to the payment of the bonds. The court hold against such right. While the Muskingum Valley Co., lessor, and the Pan Handle Co., lessee, were both parties defendant, I do not see on what principle they could have had a hearing as to their respective rights under the lease so as to bring the case within 109 U. S. 163, or how the rights of the Muskingum Valley Co. in the lease could be adjudicated so as to bring the case within 22 Ohio St., 191.

I do not think, therefore, that the rights of the Muskingum Valley Co. sought to be enforced in this proceeding, are *res adjudicata* under the decree in the Moran case.

The defendants claim that the agreement of the lease was in its terms and operation greatly inequitable, unreasonable, hard and oppressive on said Pan Handle Co., and—claiming that the road and property had been surrendered to the lessor and that the lease had been terminated by the act of the parties—that the re-establishment of the lease and the enforcement of its provisions against the P., C., C. & St. L. Ry. Co. would be grossly inequitable, unreasonable, hard and oppressive on said company, and without any equivalent consideration, past, present or prospective.

I think equity will grant specific relief under a contract when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice ; but that it will withhold such relief when it appears that, from circumstances connected with its inception, the enforcement of the contract would be unreasonably harsh and oppres-

sive, or when it appears that the contract was fair and just when made, but from subsequent events its enforcement would be unreasonably harsh and oppressive; and without any corresponding advantage to the party seeking performance. *Trustees of Columbia College v. Thacker*, 87 N. Y., 311, 317; *Amerman v. Dean*, 132 N. Y., 359; *Willard v. Taylor*, 8 Wall., 557, 566; *P., C., R. R. Co. v. C. J. R. R.*, 13 Ohio St., 544, 556. Also to the same effect: 36 Iowa, 253; 36 Ohio St., 24; 43 Ohio St., 178, 183; 1 Circ. Dec., 151 R., 275; 8 Pomeroy Eq. Opinion, sec., 1405.

Were there circumstances connected with the execution of the contract of lease which would render the enforcement of its covenants against the lessee unreasonably harsh and oppressive?

On the reorganization of the Muskingum Valley Co., in 1870, a large majority, but less than two-thirds, of its capital stock, was distributed to the Pennsylvania Railroad Company and to the Pan Handle Company, and said stock was transferred to the Pennsylvania Company in 1872, and has been held by it since that time.

During this time, and until 1890, the Pennsylvania Railroad Company and the Pennsylvania Company held over two-thirds of the capital stock of the Pan Handle Company, and the Pennsylvania Railroad Company owned and held the entire stock excepting a small amount outstanding for the purpose of qualifying directors of the Pennsylvania Company.

This ownership of stock in the Pennsylvania Railroad Company gave that Company the entire control of the Pan Handle Co., and the control of the Muskingum Valley Co., in all matters save where the concurrence of two-thirds of all the stock was required.

Of the seven directors of the Muskingum Valley Co. in 1872 and 1873, three were also directors of the Pan Handle Co.; Mr. Jewett, the president of the Muskingum Valley Co., was the general counsel of the Pan Handle Co. and a director and general counsel of the Pennsylvania Co.; Mr. Scott, one of the directors of the Muskingum Valley Co., was the president of the Pan Handle Co., and, as stated in the argument, of the Pennsylvania Ry. Co.

The history of the transaction, as shown in the letters and in the action taken by the directors and stockholders of the lessor and lessee, shows a determination on the part of the lessee, represented by Mr. Scott, to obtain a lease upon the Muskingum Valley Road. Mr. Scott was able, through the Pennsylvania R. R. Co., to control the directors of the two companies, and to control the vote of two-thirds of all the stock of the Pan Handle Co., but could control the vote of only a majority of the stockholders of the Muskingum Valley Co.

Moran Bros. could control the vote of one-third of the stockholders of the Muskingum Valley Co., and it was therefore within their power to defeat any action of that company which required the approval of a two-thirds vote of the stockholders.

From the time a lease was submitted to Mr. Moran, representing the minority stockholders, in May, 1872, to the time of the meeting of the stockholders of the Muskingum Valley Co., on January 9, 1873, there was a continual pressure on the part of Mr. Scott to have the lease executed, and a continual resistance on the part of Mr. Moran to its execution upon the ground that the terms of the proposed lease did not protect the minority stockholders and the bondholders of the Muskingum Valley Co.

During this time the rights of all the parties were fully discussed and fully understood. The various drafts of the leases were drawn on

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behalf of the lessee by the officers of the lessee; the lease which was finally executed was drawn by Mr. Jewett, president of the lessor, but also the general counsel of the lessee.

Mr. Jewett, as president of the Muskingum Valley Co., certainly had full information of the condition of the road, of its earning capacity, of its prospective value as a feeder for the proposed lessee, and it may be assumed that he, as general counsel for the proposed lessee, advised Mr. Scott fully. Mr. Scott, as director for the Muskingum Valley Co., should have had, and in all probability did have, all such information independent of the advice of Mr. Jewett.

In the negotiations it was apparent that Mr. Jewett, as president of the Muskingum Valley Co., and Mr. Scott, as president of the Pan Handle Co., were acting in unison, and for the same purpose. They evidently thought a lease was for the benefit of both companies; that thereby the Pan Handle would get the advantage to be derived from the operation of the Muskingum Valley Road in connection with its road, that the business of the Muskingum Valley Road could be operated at a less expense proportionately, and that its business would be developed to the advantage of the stockholders of that company. They could control the necessary two-thirds vote of the Pan Handle stockholders, but they could only control a majority of the stockholders of the Muskingum Valley Co. Consequently, negotiations with Mr. Moran, who controlled one-third of the stock of the Muskingum Valley Co., became necessary, and for the purpose of obtaining the consent of Mr. Moran concessions were made after due deliberation and with full knowledge of the circumstances. It would not seem that Mr. Scott or Mr. Jewett, representing the owners of the roads, would have made these concessions had they not known that they were proper to be made.

It is claimed that they were acting under the prevailing power of and in the interest of the Pennsylvania Railroad Co., the owner of a large majority of the stock of the Pan Handle Co. So long as the Pennsylvania R. R. Co. controlled by the election of directors and by the vote of its stock in the two companies, in a legal manner, and without fraud, and so long as the officers so elected by it acted without fraud, it seems to me their acts would be legal.

It was understood by all parties that it was in the power of the Pan Handle Co. to so operate the leased road in connection with its road as to increase or diminish its earnings as it would see fit. This is repeated by Mr. Moran in his letters.

The road and property was placed in the hands of the Pan Handle Co., in confidence that it would be operated in such manner as to make the arrangement a success.

Mr. Moran, in his letter of January 6, 1873, to Mr. Scott, says:

"I have thus given up nearly every stipulation for the protection of the minority interests of the shareholders of the C. & M. V. Ry. Co., placing my interest entirely in your hands, and must look to you and your company to so arrange the affairs of the road as not to make me regret the confidence I have placed in you."

Have subsequent events transpired which would render the enforcement of the lease a hardship or an injustice to the lessee?

It is clear from the evidence that in the operation of the road under the lease from 1879 to 1885, the lessee expended large sums of money in excess of the amounts received from the road, and that, in the operation of the road from 1886 to and during the year 1894, large amounts were

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also expended in excess of the amounts received, and that additions and improvements became and were necessary during said time.

If we should consider simply the amount of earnings received from the road, and the amounts expended in its operation during these years, the contract of lease would certainly appear to be a hard one.

But it seems to me, under the authorities, the subsequent events, which would relieve the lessee from the covenants of the lease, must be such as could not have been reasonably foreseen.

The court, in *B. E. & C. R. R. Co. v. N. Y., L. E. & W. R. R. Co.* (123 N. Y., 316) say on page 330 :

"A contingency has happened in the case not within the contemplation of either of the parties to the contract, to-wit: The continuous failure of the plaintiff company to earn money enough to pay all its operating expenses, etc. * * * Under these circumstances no specific performance will be decreed."

In that case the company was chartered in 1881; the contract was made in 1883; in 1882 the road had earned more than enough to pay operating expenses and interest and a dividend to its stockholders. The operation of the road was left in the hands of the company owning it. It would seem, under these circumstances, that the parties might reasonably anticipate success in the future operation of the road, and that failure would be a disappointment. The court say:

"It never could have been contemplated that the company would permanently cease to earn enough even to pay operating expenses, and it can not be supposed that it was ever in the thoughts of the two officers of either of the two companies that the time would speedily come when such a contingency would arise and seemingly become fixed a financial condition." *Ib.* 328.

In the case at bar, however, the original company was organized in 1851; in 1857 the mortgage securing the bonds was foreclosed for default in payment of interest; a new company was organized, and in 1869 its mortgage, securing the bonds, was foreclosed for default, in payment of interest.

Thus, in a history of nearly twenty years, the owners of the road had not been able to make sufficient out of its operation to pay the expenses of operation and interest.

On the reorganization by the present company in 1870 the road was extended to Dresden Junction, thereby probably increasing its earning capacity; but its bonded debt was also increased.

In the year ending March, 1872, it was operated at a profit over and above all expenses and interest on its bonded indebtedness, and representations were made during the years 1871 and 1872, by the officers of the company, that the road was earning sufficient to pay its expenses and the interest; but for the next fiscal year ending in March, 1873, it was again operated at a loss.

So that during all but one year, out of some twenty-two years, prior to the execution of the lease, the road had been operated at a loss.

The repairs, additions and improvements which were necessary on the road for its successful operation at the time it passed into the hands of the lessee, are strong evidence that the companies owning it prior to that time had not been earning sufficient money out of the road to put it in good condition, or keep it in good condition.

Could the lessee, with full knowledge of these facts, reasonably anticipate that the road, depending upon its own resources, would be

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able to earn in the future more than it had in the past, or was earning during the year in which the lease was executed?

The fact that, subsequent to the execution of the lease, competing roads were built, would hardly relieve the lessee in this matter, as it would hardly count on having no competition during the term of the lease.

It is evident that Mr. Moran, representing the minority stockholders, did not anticipate that the road would earn sufficient to pay the interest. It was for this reason, as shown by his letters, that he fought so long, and finally with success, for a covenant in the lease providing that the lessee should advance money to pay the interest on the bonds in case of a deficiency. It was his opinion that the earnings of the road would depend entirely upon the operation of the same by the lessee in diverting traffic to or from the same; that if the lessee would permit traffic to go over the leased road from its road, which he urged would be the most economical way of doing the business, the operation of the leased road would be made profitable; and that in the absence of such manner of operating the road the results would be doubtful.

Mr. Scott was more hopeful. Thinking, and urging on Mr. Moran in his letter of November 19, 1872, that by putting on additional equipment and by developing its coal trade with Cincinnati and Cleveland through additional connections, the road could be developed without calling upon the stockholders as ultimately to make it a valuable property.

But Mr. Moran was apparently not satisfied, and still insisted upon the covenant, that the lessee would advance the money to pay the interest, the sums so advanced to be repaid only out of the future earnings. The reluctance on the part of Mr. Scott with which such covenant was incorporated in the lease would indicate that Mr. Scott had very little faith in the future prospects of the road, so far as its earning capacity was concerned. In fact, in that letter he wrote that they might find themselves in a very embarrassed condition by issuing additional bonds unless the stockholders would take them.

It is claimed that the lessee could derive no profit from the lease or the earnings of said railroad in any event, as the entire net earnings were to be turned over to the lessor company.

Mr. Scott, in his letter of November 19, 1872, in discussing the question of the lease, says that his company, the Pan Handle, is "willing to work the line and give the stockholders all the net results."

This purpose of the Pan Handle Company is carried out in the lease. It was, therefore, contemplated during the time the negotiations for the lease were going on, and at the time the lease was executed, that the Pan Handle Co. should derive no profits from the earnings of the road in any event.

But it does not appear that the lessee would derive no profit from the lease.

Considering all the circumstances in the case, it seems to me the purpose of Mr. Scott in obtaining a lease on the road for the term of ninety-nine years—and in order to obtain which he was willing to make the concession required by Mr. Moran—was that the road would thereby become a permanent feeder for the Pan Handle lines; that thereby the Pan Handle lines would get the advantage which might accrue to them by operating the road in connection with them during a term of the lease.

This seems to be the only reasonable solution of the acts of the parties.

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It is claimed under Gear on Landlord & Tenant, sec. 11; Fry on Specific Performance, sec. 982; 1 Young & Collier, 341; 8 Vesey, 92; 3 Hill Ch., 140, that the agreement will not be specifically enforced because the lessor is insolvent. But the lessor was insolvent, as set up in the answers, and, as I think, to the knowledge of all parties, when the lease was executed. Its insolvency is not a subsequent event. The contract was made by an insolvent corporation.

The money to be advanced to pay interest was to be paid out of the subsequent earnings of the road, and not otherwise. Therefore, as the lessee could have no claim over against the lessor for the same, it is immaterial whether the lessor was solvent or insolvent. In that respect this case is distinguished from 123 N. Y., 316 supra., in which the court found there was no obligation on the part of the company receiving the money to repay the same.

The judge of the United States court, on practically the same testimony that has been submitted to me, has held that "that court would not compel the lessee to specifically perform the provisions of said lease or enforce the lessee's covenant to make advances beyond the net earnings of the demised road sufficient to pay the interest on the lessor's bonds and leave it to look alone to the future earnings of an insolvent road for its reimbursements, because the enforcement of that agreement would be grossly inadequate, unreasonable, hard, oppressive on the lessee, and without any equivalent consideration, past, present or prospective, etc."

I can only say that, under the authorities, and in view of all the circumstances of the case, I cannot agree with the learned judge of the circuit court in his view of the harshness of the contract.

That the enforcement of the contract would be a benefit to the lessor is manifest. It would pay its debt and would protect its property from being sold under the threatened decree of foreclosure.

It is claimed on behalf of the defendant that the condition of the lease that the lessee will advance the needful means to pay coupons at maturity in the event the net earnings of the leased road are not sufficient to protect the interest on the first mortgage bonds as it matures, was an agreement to lend the money to the lessor in expectation of being repaid, and that as the lessor is insolvent, and as repayment will not be made, a court of equity will not enforce the agreement; and counsel cite the Eldred and Cuba R. R. Co. v. The New York, Lake Erie & Western Ry. Co., 123 N. Y., 316, in support of the proposition.

The Eldred Road, connecting with the Erie Road, had been constructed by parties in interest with the Erie Company with a view of contributing business to the Erie Company, and the Eldred Company needing assistance from the Erie Company, agreed with that company: First, To deliver all freight and passengers to that company for transportation that it could control or influence, and to use its influence to promote the interests of that company; and Second, For the purpose of protection of the Erie Company in rendering assistance to the Eldred Company under the contract, the Eldred Company would cause to be deposited with the Erie Company a majority of the capital stock of the Eldred Company, upon which, as long as the management of the Eldred Company shall be satisfactory to it, the Erie Company would give the right to vote to such representative of the Eldred Company as shall be designated by it.

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The Erie Company agreed : First, To use its influence to promote the interests of the Eldred Company ; and, Second, " That upon condition that the corporate control of the Eldred Company shall become and remain vested in the Erie Company, as above provided, the Erie Company will make good any deficiencies in the net earnings of the Eldred Company, to meet the interest upon its present bonded indebtedness from time to time as the same becomes due and payable, and for any and all advances so made by it, with interest thereon, as well as for any and all advances made to said Eldred Company by the Erie Company for other purposes, with interest thereon, the Erie Company shall have, and is hereby granted, a first lien upon the railroad franchises and property of the Eldred Company next after its bonded indebtedness aforesaid, and a first charge upon its surplus earnings next after the payment of the accruing interest upon its said bonded indebtedness."

The Eldred Company duly performed the agreement on its part, and, there being a deficiency in the net earnings to meet the interest on its bonded indebtedness, and the Erie Company failing to make the same good, the Eldred Company brought an action for an account and asked for judgment for the amount that should appear to be due on the account. A decree in favor of the plaintiff was entered in the court below, which was " substantially a decree for the specific performance of a simple contract to advance money to the plaintiff company."

The Court of Appeals say, p. 325 : " Generally speaking, equity does not decree a specific performance of such a contract. This case is sought to be distinguished from this general rule by the fact that the defendant, under this contract, while bound to make the advances, even if there were an entire failure of net earnings, had no right under it to claim repayment of such advances until net earnings should be made, and that the repayment must proceed from such fund. It is urged that this is one of the chances taken by the defendant when it agreed to make such advances, and that the consideration for such agreement to advance and to rely for repayment upon the future existence of a fund arising from the earnings was to be sought in the other part of the agreement by which the defendant was to reap the advantage of the so-called traffic arrangement between the two companies."

But the court say, p. 337 : " The whole substance of the agreement, so far as the advances are concerned, is that an obligation is assumed by the defendant to advance money enough to make up any deficiency in the net earnings to pay the interest on the bonded indebtedness of the plaintiff company, and that company was placed thereby under an equal obligation to repay to the defendant the amount of such advances upon demand, or, in other words, immediately. Such an obligation is not the subject of a decree for a specific performance in equity. If there be any remedy at all, that remedy is at law, by a recovery of damages."

And the court holds that in an action at law there must be proof of damages, and says :

" And it is equally plain that it must be a rare case indeed where it can be said that a person has sustained any damages by the refusal of another to advance money which he has agreed to advance, where the person to whom it is to be advanced is by the agreement under a valid obligation to pay it back immediately." It is, therefore, clear that the reason of the court in holding in this part of its decision against the claim of the plaintiff, was because, under the agreement, there was an obligation on the plaintiff to repay such advances as should be made by

the defendant; that the provision for a lien on the franchises and property of the company and a charge on the earnings were in the nature of securities for the obligation of repayment.

The first drafts of a lease submitted by Mr. Scott to Mr. Messler contained no provision relating to the repayment of the coupons by the lessee. To this objection was made. He wanted a guaranty on the part of the lessee to pay the interest.

After much negotiation another draft of the lease was submitted, with a stipulation that in the event the net earnings of the leased line were not sufficient to protect the interest on the mortgage bonds as it matures, the lessee "shall advance the needful means to pay the coupons at maturity, charging any such advance over the net earnings, in open account, to be returned out of subsequent earnings."

But this was still not satisfactory. Fears were had and expressed that there could be a recourse on the lessor for the money advanced. The fears were quieted by the assurances of Mr. Scott, but Churchill and Fillmore were not satisfied, and so wrote Moran, and as a result Moran wrote his letter of January 6, 1873, with a postscript to the effect that the lease should express, in clear language, that the Pan Handle Co. should look only to the future earnings of the leased road for reimbursement of any advances, and as a result of these further negotiations, at the meeting of the stockholders of the Muskingum Valley Co., on January 9, 1873, the words, "and not otherwise," were added to the stipulation in the lease as to the reimbursement of money advanced.

It seems to me clear, from the history of this stipulation in the lease, that the intention of the parties was that the lessee should have no recourse on the lessor company for advances made. The lessee should look only to the subsequent earnings of the road, and the lessor company was not placed under an obligation to repay to the lessee company the amount of any such advances. The consideration for such agreement to advance and rely on the subsequent earnings of the leased road for repayment, is to be sought in the other part of the agreement, by which the lessee was to reap the advantage growing out of the control of the leased road.

It would seem, therefore, that the contract in this case for the advancement of money to meet the interest on the mortgage bonds of the lessor company is distinguished from the contract in the 123 N. Y. case in the point on which the decision of that court in this part of its decision turned.

The defendants further claim, "that in said alleged agreement of lease it was expressly provided that said Muskingum Valley Co. should at its own expense, perfect and completely finish its said railroad, and should also, at its own expense, make and finish such additions and improvements thereto as said Pan Handle Co. should determine to be necessary from time to time for the prompt and economical movement of the traffic on and over said road; that said Muskingum Valley Co. was unable and wholly failed to perform said covenant on its part to be performed, and by reason thereof said Pan Handle Co., in order to operate said road with safety, was compelled to and did expend for said purpose up to December 31, 1884, the large sum of \$140,000.00 and over, and that said Muskingum Valley Co. has not refunded said sum, or any part thereof, and has not been and never will be able to do so."

The lease provides, "that certain work yet to be done and required to perfect and completely finish the said road hereby demised, as well as

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such additions and improvements thereto as the parties of the second part shall determine to be necessary from time to time for the prompt and economical movement of the traffic on and over said road, shall be done by and at the expense of the said first party."

It is claimed by the plaintiff that the money to pay for the additions and improvements was to come from the gross receipts and be paid as an addition to operating expenses; that this provision is in form and fact a provision to an agreement for the appropriation of the earnings of the property, and in legal effect is a stipulation and nothing more, that there should be added to the operating expenses before the ascertainment of the net earnings or "surplus" the amount of these betterments to be settled between the parties as best they might; then to pay the surplus, if any should thereafter remain to the treasurer. If, however, the provision is to be treated as a covenant, it is an independent covenant, and the consideration is the promise, not its performance. It is claimed by the defendants that, while this stipulation is included in the part of the lease providing for the disbursement of the earnings, it is not a part of the same; that it is a specific stipulation under which an obligation rests on the Muskingum Valley Co. to make the additions and improvements or to repay the expense of the same; that the agreements of the lessee under the lease are dependent upon the performance by the lessor of its stipulation to make the additions and improvements; that the covenants are dependent, or at least mutual. But whether the covenants are dependent or independent is immaterial, as a court of equity will not grant specific performance if it would be inequitable or unconscionable, and that the stipulation in regard to the additions and improvements was an important one. It was a large part of the consideration for the agreement on the part of the Pan Handle Co. to maintain and operate the railway and to collect and apply its income; a failure to make the betterments would essentially interfere with the beneficial enjoyment of the premises leased.

The defendant, by its answer, avers that the "Muskingum Valley Co. operated the railroad and property up to May 1, 1873, and its earnings were insufficient by a very large amount to pay the interest which matured on its said bonds, and said company was insolvent throughout the years 1872 and 1873, and up to and through the year 1885," etc. It seems to me that the evidence in the case fully establishes this averment. While it appears that in 1872 the road was run at a net profit, yet it appears that for the year ending March 31, 1873, it did not produce a sufficient amount of earnings to pay the interest on its bonds. While a balance may be figured out from the reports to have been in the hands of the company in April, 1872, yet it appears all through the case that the company was not then and never had been in a condition financially to pay the interest on its bonds and to maintain its road in a manner necessary for the prompt and economical movements of the traffic.

It is claimed by the defendant "that not long after the lease was made the Valley Company became wholly insolvent, and has ever since remained so. When the improvements and additions were made by the Pan Handle Co., the Valley Co. had no means, and was insolvent." But it seems to me under the answer of the defendant and under the evidence in the case, the Muskingum Valley Co. was insolvent at the time the lease was executed, and has been insolvent long prior thereto.

At the time of the execution of the lease all the property of the Muskingum Valley Co. went into the possession of the lessee. That no

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property was left in the hands of the lessor is apparent from the provisions in the lease, that the lessee should advance not to exceed \$2,000.00 a year to defray the expenses of maintaining the corporate organization of the company if the net earnings of the road under the lease should not be sufficient.

The lessor had nothing out of which to pay the expenses for additions and improvements except the net earnings which it might receive under the lease.

These are the circumstances under which this agreement as to additions and improvements was made, and it must be construed with reference to them. It was clearly not contemplated that the lessor should pay such expenses on demand, as by the act of the lessee in taking possession of the property, the lessor was deprived of its capacity to earn money, and it was only in the event that the lessee should operate the road in such a manner as to produce a surplus of earnings that the lessor would have anything with which to pay.

It could hardly have been contemplated that the payment should be a condition precedent to the continuation of the lease, as, if it were, then the contract of the lease, which was for ninety-nine years, had, to the knowledge of the parties, that within it which destroyed it almost at its inception.

It is contended, however, that if the Muskingum Valley Co. had no other recourses, the parties may have expected that in case of necessity therefor the stockholders or the bondholders would contribute funds to enable it to make such additions and improvements.

I do not think the circumstances, as shown by the evidence, indicate any intention on the part of the stockholders or of the bondholders to make any further advances. They were willing to issue more bonds providing Mr. Scott thought the earnings would be sufficient to pay the interest; but he was fearful, and the bonds were not issued.

It is true the constitutional liability of the stockholders for the payment of debts existed, but there is nothing to indicate that the parties contemplated payment of this debt by the enforcement of this liability.

In the letter of June 7, 1872, Mr. Moran objects to this provision, and asks out of what the expenses shall be paid, if they exceed the surplus earnings; and in the letter of October 18, 1872, he suggests that the provision be made to read that no expenditures for such work shall ever be made in excess of the surplus earnings after payment of interest, etc.

An interview was had between Mr. Moran and Mr. Scott, at which many things seemed to have been agreed upon, and on another draft of the lease being subsequently submitted to Mr. Moran, containing the same stipulation, Mr. Moran, in his letter of December 12, 1872, makes no objection to the provision further than to suggest that it be changed so as to provide that the work be done by the lessor in place of the lessee. That Mr. Moran was at this time not unmindful of claims accumulating against the lessor which the lessor might be called upon to pay, is shown by his remonstrance in this letter against any claim accumulating for money advanced to pay interest. Had he not then understood that the expense of the additions and improvements should be paid only out of the earnings, he certainly would then have protested.

In the postscript to the letter of January 1, 1873, Mr. Moran says the lease should express in clear language that the lessee should not have power to sell the road through any advances made for construction

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account. In his letter of January 6, 1873, to Mr. Scott, Mr. Moran, being satisfied that the road could not be sold to pay for money advanced for interest, makes no objection to the provision as to money advanced for additions and improvements.

In the letter written to Mr. Churchill, on December 29, 1872, Mr. Moran says that Mr. Jewett and Mr. Scott call his attention to the fact that increased earnings require additional side tracks, equipment, etc., and that the lessee cannot be expected to incur them if they are to be at his sole risk, so long as the earnings are inadequate to defray them. While the letter of Mr. Jewett to Mr. Moran, of December 25, 1872, is not very clear, yet it would seem to indicate that Mr. Jewett contemplated that the expense of the additions and improvements was to be paid out of the earnings.

The Pan Handle Co. entered into the contract of the lease with the Muskingum Valley Co. knowing that it was insolvent. Under the lease the Pan Handle Co. took possession of all the property to be operated by it and to pay the surplus over to the Muskingum Valley Co. The Pan Handle Co. knew that the Muskingum Valley Co. had no means with which to make the additions and improvements or with which to pay for the same save as there might be a surplus of earnings produced by its operation of the road. Therefore the Pan Handle Co. could not have anticipated that the Muskingum Valley Co. would either make the additions and improvements, or would pay for them, save as it could do so out of surplus earnings, and the lease must have been executed with the understanding on the part of the Pan Handle Co., as well as on the part of Mr. Moran, that the additions and improvements were to be made by it and paid for out of the earnings of the road. And as the Muskingum Valley Co. had nothing with which to pay except the surplus earnings, settlement as between the lessor and lessee should be made out of them. The Pan Handle Co. made the additions and the improvements and at no time made demand on the Muskingum Valley Co. for payment.

This is the contract the Pan Handle Co. made with full knowledge of all the circumstances. It did or should have, anticipated all the results. I do not think the failure on the part of the Muskingum Valley Co. to make payment, or the failure of the Pan Handle Co. to produce a surplus out of which payment could be made, are subsequent events which would render the enforcement of the contract unreasonably harsh or oppressive.

Tideman on Real property (2 ed.) sec. 194, lays down the proposition: "Nor is the lessor's performance of his covenant to repair a condition precedent to the tenant's liability on his covenant for rent."

This is supported by the case of *Newman v. French*, 45 Hun., 65, and under this authority it would appear that the covenants are independent.

The defendants claim that the net earnings of the Muskingum Valley Co. in the operation of its road up to May 1, 1872, were insufficient by a large amount to pay the interest on its bonds; that said company was insolvent in 1872 and 1873, and up to and through 1875; that in 1872 and 1873 the Pan Handle was doing a prosperous business and had, after paying all operating expenses, a large surplus of net yearly earnings; that prior to 1873 the bonds of the Muskingum Valley Co. were of little value because of the insolvency of the company and its inability to pay interest; that the negotiations for the lease were entered into in 1872, and it was not then contemplated that the Pan Handle Co. should

advance any means to pay interest on the bonds of the Muskingum Valley Co.; that through the years 1872 and 1873 the president of said Muskingum Valley Co. was a director and general counsel of the Pan Handle Co. and also general counsel of the Pennsylvania Co.; that the Pennsylvania Railroad Co. and the Pennsylvania Co. who owned a large majority of the stock of both said Pan Handle Co. and the Muskingum Valley Co., had, as owners of \$752,000.00 of the bonds of the Muskingum Valley Co., large pecuniary interests directly adverse to the interest of the minority stockholders of the Pan Handle Co., and by means of their control of the latter company caused said alleged agreement of lease to be executed by its officers; that the provisions of said lease were directly adverse and greatly prejudicial to the interest of the minority stockholders of the Pan Handle Co., and were in law a fraud upon their rights and void.

It is clear that the Pennsylvania Railroad Co. and the Pennsylvania Co., through its ownership of a majority of the stock of the Pan Handle Co., controlled in the election of directors of said company, and the evidence shows that at the meetings of the stockholders of the Pan Handle Co. at which the subject of the lease was under consideration, said companies voted their stock in favor of the lease. It is also clear that the Pennsylvania Co., through its ownership of a majority of the stock of the Muskingum Valley Co., controlled in the election of directors of that company, and the evidence shows that, at the meeting of the stockholders of that company, the Pennsylvania Co. voted its stock in favor of the lease.

- I take it to be the law that the stockholders of a corporation, so long as they act within the law and in good faith, may vote their stock for such persons as directors and for such measures as to them may seem best; and that, in doing so, they are not bound to observe the wishes or interests of other stockholders. L. R., 9 Eq., 354.

The fact that the Pennsylvania Railroad Co. owned the majority of the stock of the Pennsylvania Co., and that these two companies owned the majority of the stock of the Pan Handle Co. and of the Muskingum Valley Co., would not preclude them from voting their stock; but it must appear that they acted in good faith towards the minority stockholders. Cook on Stock and Stockholders, 3 ed., sec. 662. It certainly appears that the Pan Handle Co. and the Pennsylvania Railroad Co. and the Pennsylvania Co. acted in unison to effect the lease; but such action was the result of the control of the Pennsylvania Railroad Co. over the other companies by the ownership of stock. But the mere fact that it owned the majority of stock does not raise a legal inference of undue influence. 120 U. S., 670.

The Pan Handle Co. acted in the matter by its directors duly elected by the stockholders, and their action was approved by the vote of 135,800 shares for, to 1275 shares against the lease, at the meeting of December 30, 1872; and by the vote of 135,841 shares for, and none against the lease, at the meeting of March 18, 1873—the total stock of the company being 168,671 shares. The large majority by which the lease was ratified by the Pan Handle Co. shows that the stockholders of that company were practically unanimous in ratifying the lease as being for the best interests of the company. 54 N. Y. Sup. Ct., 179.

The Pennsylvania Railroad Co. held a majority of the bonds of the Muskingum Valley Co., which were bearing 7 per cent. interest. It was clearly to its advantage to have the interest paid; but at the same time

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the Pennsylvania Railroad Co. held over two-thirds of the stock of the Pan Handle Co., and payment of the interest by the Pan Handle Co. was to the detriment of the Pennsylvania Railroad Co. I think a mathematical calculation shows that its loss on its stock by the payment of interest was greater than its gain by receiving interest on its bonds. The loss to the minority stockholders by the payment of interest was greater in proportion than the loss of the Pennsylvania Railroad Co., as it was not off-set by the receipt of money as interest. While the interests of the majority stockholders and of the minority stockholders were different in degree, yet they were not antagonistic. The payment of interest on the bonds was detrimental to both.

Under these circumstances, could it be said to be a fraud on the part of the Pennsylvania Railroad Co. to vote for the lease?

If there was fraud on the part of the majority to the prejudice of the minority stockholders, he may have his remedy. "A court of equity will intervene and protect the minority upon an application by the latter." *Cook on Stock and Stockholders*, 3 ed., sec. 662; *L. R.*, 9 Eq., 35. Provided they are not barred by laches. *Peabody et al. v. Flint et al.*, 88 Mass., 52, 57. But I cannot appreciate upon what principle the Pan Handle Co. can, in this case, set up that by a vote of the majority of its stockholders it entered into an agreement to the prejudice of the minority stockholders, and asked to be relieved from the covenants of its agreement, otherwise valid. If we can recognize in this case the majority stockholders and the minority stockholders, then we must recognize that it is the same majority stockholders who caused the execution of the lease, who are today claiming that by doing so they perpetrated a fraud upon the minority stockholders, and that by reason of having perpetrated such fraud they should be relieved of their agreement. Even if the lessee corporation could be heard to set up the right of its minority stockholders, I think that under the circumstances of the case it would be barred by laches. 145 U. S., 408.

The minority stockholder is not here complaining. He brought his suit in Jefferson county, setting up all matters now set up by the company, but he dismissed his case and went out of court.

Three of the directors of the Muskingum Valley Co. were also directors of the Pan Handle Co. But it would seem that in the action of directors the court will not interfere on the ground that a minority of the board of directors of one company were also directors of the other company, between which two companies a transaction is had 34 Ohio St., 450, unless they are guilty of fraud or a breach of trust. 37 Ohio St., 556.

The record shows no fraud on the part of the directors of the Pan Handle Co. or Muskingum Valley Co.

It is further claimed upon the part of the defendants that the alleged agreement of lease was not legally executed on the part of the Pan Handle Co., in that it was not ratified by the vote of the stockholders of said company at a meeting legally called for said purposes.

It appears, too, that at the meeting of the directors of the Pan Handle Co., held on March 17, 1873, a resolution was passed that the lease as modified be submitted to the stockholders of said company at their annual meeting, to be held on March 18, 1873; that at the annual meeting of the stockholders of said company, held at said time, the said lease was approved, ratified, etc.

It is provided by the act passed March 19, 1869, 66 Ohio L., 32, in force at the time of the execution of the lease, that:

"Any railroad company organized in pursuance of law, either within this or any other state, may lease or purchase any part or all of any railroad, the whole or a part of which is in this state, and constructed, owned or leased by any other company, if said company's lines of said road are continuous or connected at a point either within or without this state, upon such terms and conditions as may be agreed on between said companies respectively ;" provided that no such lease shall be "perfected until a meeting of the stockholders of said company of this state, party to such agreement, whereby a railroad in this state may be * * * leased * * * shall have been called by the directors thereof at such time and place and in such manner as they shall designate, and the holders of at least two-thirds of the stock of such company represented at such meeting in person or by proxy and voting thereat, shall have assented thereto;" etc.

It would seem that the provisions of the statutes were complied with on the part of the Pan Handle Co., unless it be that the matter of the lease was submitted to the stockholders at the next annual meeting, in place of being submitted to them at "a meeting of the stockholders of said company, * * * called by the directors thereof at such time and place and in such manner as they shall designate."

It will be noticed that the statute makes no provision for notice of such meeting being given for any length of time. While the directors did not call a meeting, they ordered that the matter be submitted to the stockholders at a meeting, the time and place of which was fixed and known by all the stockholders.

Of the 168,671 shares of the capital stock of said company, 185,841 shares were voted, all for said lease, at the meeting of March 18, 1873. No protest was entered, and no objection was made by any stockholder. Under the resolution passed at this meeting, the lease was executed, the lessee went into possession, remaining in possession and complying with all the terms of the lease until 1885, when Samuel Jeans brought his suit in Jefferson county, based upon his protest against said lease, entered at the meeting of the stockholders of the company held December 30, 1872, and dismissed the same in 1892.

Even if the point were well taken, it seems to me it is too late now for the Pan Handle Co. to raise it. 88 Mass., 57.

And it is further contended that the power given by the legislature to one railroad company to lease the road of another company does not include the power of the lessor to make any guaranty of the obligations of the other, that such guaranty is entirely foreign to the provisions of such a lease as the legislature contemplated should be made, and that such guaranty is not obligatory on the lessor ; that there is no sufficient consideration for such guaranty.

But as the legislature has given the right to a railroad company to lease the road of another, it certainly, by implication, gave the right to stipulate for the payment of a rental. In this case no specific rental is contracted for, the lessee does not guarantee the payment of the interest, but it stipulates that it will advance the needful means to pay the coupons at maturity, to be refunded out of the subsequent earnings. If by its operation of the road, earnings were produced, to that extent the amounts so advanced would be returned; if no earnings were produced, a return would not be made. The contingency of earnings was one of the chances taken by the lessor. The amount stipulated to be paid was seven per cent. on the bonds which had been issued for the purpose of building the road—the cost of the road—with a chance of a return of

the same or a portion of the same. This would not be an excessive rental.

But further, the payment of the interest on the bonds was a condition precedent to the continuation of the lease, as all the parties well knew; if the interest was not paid, the mortgage would be foreclosed. Surely the lessee could contract to do that which would make the lease possible.

The defendant sets up the proceedings in the suit brought by Samuel Jeans et al., in Jefferson county; that on or about January 1, 1886, the Pan Handle Co. turned over and surrendered all of said railroad and property of said Muskingum Valley Co. to the latter company; that the said Muskingum Valley Co. accepted such surrender and resumed the control and possession of said railroad and property; that since said time the companies have regarded and treated said alleged lease as surrendered and terminated, and said Muskingum Valley Co. had possession and control of said road and property, and operated the same ever since.

And the defendant sets up the proceedings of the directors and stockholders of the respective companies at the meeting of the directors of the Muskingum Valley Co., held January 4, 1893; at the annual meeting of the stockholders of the Muskingum Valley Co., held March 28, 1893; at a meeting of the directors of the P., C., C. & St. L. Ry. Co., held on January 5, 1893; at the annual meeting of the stockholders of the P., C., C. & St. L. Ry. Co., held on April 11, 1893, and claims that the said lease was cancelled and terminated, and the railroad and property were surrendered by the lessee to the lessor and accepted by the lessor.

It appears from the evidence that the action of the Pan Handle Co. in turning the property over to the officers of the Muskingum Valley Co. on or about January 1, 1886, was taken after the appeal from the decree in the Jeans case was perfected, and I suppose it could therefore hardly be claimed that the act of the company was taken under said decree. *Henry v. Jeans*, 48 Ohio St., 443, 458.

But it seems to me clear that by dismissal of the Jeans case all proceedings in that case drop out of consideration in determining the rights of the parties. The question remains whether, by the acts of the parties, the lease was cancelled and terminated.

On April 15, 1873, and after the execution of the lease, an act was passed, 70 Ohio L., 129, amending the act of March 19, 1869, *supra*. This act provides that no such lease shall be "perfected until a meeting of the stockholders of each of said companies shall have been called for that purpose by the directors thereof on thirty days' notice to each stockholder, at such time and place and in such manner as is provided for the annual meetings of said companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, shall have at such meeting assented thereto," etc.

Judge Jackson held in the Moran case, that "the lessor and lessee could themselves have vacated and terminated said lease by mutual agreement at any time."

Judge Van Brunt held, in 11 Daly, 373, 377, that under chap. 218 of the Laws of 1839 (N. Y.) given below, the directors, with the assent of the stockholders, could modify the lease; and the Court of Appeals of New York, in the Beveridge case, 112 N. Y., 1, held, under the same act, that the directors could modify the lease.

It seems to me, therefore, that powers to cancel the lease existed in the corporation. The difficult proposition to determine, however, is, in what mode may the lease be cancelled?

It is claimed on the part of the defendant that while the power of one corporation to lease the road of another corporation is not one of the ordinary powers of the corporation, and does not exist except as given by special enactment, yet that a lease, having been executed by two corporations under such special enactment, the power to cancel the same is one of the ordinary powers of the corporation, and may therefore be exercised by the directors. The proposition is that the primary and main design of authorizing the formation of a railroad company is to construct, maintain and operate a railroad, sec. 3270 Rev. Stat., not to construct roads to lease to other companies, or to lease roads from other companies to be operated. A railroad company cannot, therefore, lease its road, unless expressly authorized to do so by the legislature; but when the power to lease is granted, such power, being a "corporate power," is to be exercised by the directors under sec. 3248, Rev. Stat. If, however, the assent of the stockholders is required by the statutory provisions, a lease made by the directors does not become operative until such assent is given. And it is urged that the reason of the rule that a corporation may not lease its road without legislative authority, is that the franchise is granted to the company to be exercised for the public good, the due performance of its franchises being the consideration of the public grant. And that any contract undertaken without consent of the state to relieve such company of the burden imposed by the charter, is a violation of the contract with the state, and is void as against public policy, citing 101 U. S., 71; that the power to make a lease, therefore, does not exist unless expressly conferred, because it is a departure from the objects intended to be accomplished by the grant of the franchises; but the vacation and termination of a lease simply restores the parties to their original legal and actual state established by the charter. No new powers are thereby created. The power to vacate and terminate a lease is therefore one of the "corporate powers" which under sec. 3248 must be exercised by the directors.

I think it is well settled by 101 U. S. 71, 118 U. S. 290; *Ib.* 630, 145 U. S. 393, that unless specially authorized by its charter or aided by some other legislative action, a railroad company cannot, by lease or other contract, turn over to another company for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers. Such contract is not among the ordinary powers of a railroad company, and is not to be inferred from the usual grant of powers in a railroad charter.

The reason of this proposition seems to be only as stated by the defendant, but also as stated in 11 Peters, 421, "Public grants are to be construed strictly."

But it seems to me to follow from this proposition that the power to cancel a lease can not exist in a corporation until the power to execute a lease is given to it. It can not be an ordinary, corporate power conferred by the charter. The corporation can not have power to loosen that which it has no power to bind.

While it is held that in grants by the public nothing passes by implication, 11 Peters, 421, 546, yet the rule applicable to all statutes, "that what is fairly implied is as much granted as what is expressed," applies to statutes granting powers to corporations, 101 U. S. 82, and it

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seems to me that the power to cancel may be fairly implied from the power to execute.

By the statute, no provision being made with reference to the mode in which a lease executed under it may be cancelled, it would seem the intention of the legislature was to allow its mode of cancellation to be governed by the general rule established by the law with respect to the cancellation of contracts generally.

The rule of law is laid down in Broome's Legal Maxims, p. 877; "Nothing is so consonant to natural equity as that every contract should be dissolved by the same means which rendered it binding." * * * "An obligation is not made void but by a release; for naturale est quid libet dissolvi eo modo quo ligatur. A record by a record, a deed by a deed, and a parol promise or agreement is dissolved by parol, and an act of parliament by an act of parliament. This reason and this rule of law are always of force in the common law." Ib.

If, therefore, the agreement to lease is not perfected until ratified by the stockholders under the statute, an agreement to cancel the lease would not be perfected until ratified by the stockholders under the statute.

It would seem this rule of law is applicable, not only because it is a rule of law, but because its application is necessary to carry out the intention of the legislature in making provision for the execution of a lease.

The lease of a road necessarily affects the interests of the stockholders of the lessor and lessee companies.

Judge Gholson says, in 1 Disney, 92: "The legislature has, in some cases, in respect to some matters, authorized action on the part of stockholders, and directed their assent to be obtained. Such provisions will be found in the general railroad law, and they are on all points vitally affecting the interests of the stockholders."

It was clearly the intention of the legislature that the interests of the stockholders should be protected, not only through their directors, but also by the power given them to ratify or reject a proposed lease; the act of April 15, 1873, even providing that any stockholder who shall refuse to assent to the proposed lease, shall be entitled to receive from the lessee the average market value of his stock.

It certainly could not be rightfully claimed under these statutes that after the lease had been executed containing the provision for the advancement of money to pay interest on the bonds, which was inserted at the instance of Mr. Moran and for the purpose of getting the stockholders represented by him to consent to the lease, that the directors of the companies could modify the contract by a rescission of the stipulation. The purpose of the law could not be evaded in this manner. If this be true then could the lease be modified as to its term by the directors? Could they change the term from ninety-nine years to, say, ten or fifteen years, without the consent of the stockholders? The stockholders represented by Moran consented to the lease for a term of ninety-nine years, and with a stipulation contained in it as to the advancement of money for the payment of interest during the term of lease, or so long as the bonds are outstanding, not for a term of ten or fifteen years, and not that the money should be advanced for ten or fifteen years; I do not see upon what principle the rights of the stockholders of the lessee company in the leased property, or the rights of the stockholders of the lessor company in the stipulations of the lease, can be modified in any particular or can be

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cancelled, without their assent. The cancellation of the lease is in effect its modification by changing its term from ninety-nine years to a shorter term.

"If the board of directors could not make a new lease upon definite terms and conditions, then clearly they could not radically modify the old lease. If they could not make a new lease directly, then they could not in effect make a new lease by striking out of the old lease substantial covenants upon the part of the lessee and inserting others. What would be unlawful if done directly, cannot be legal because done indirectly."

Judge Van Brunt, in *Metropolitan R. R. Co. v. Manhattan Elevated R. R. Co.*, 11 Daly, 373, 471.

This decision was followed in *Harkness v. Manhattan Ry. Co.*, 54 N. Y. S. C., 174, 179. The Court of Appeals, in *Beveredge v. N. Y. E. Co.*, *infra.*, holds that the directors may modify a lease because they may make the lease. This does not controvert the above proposition of Judge Van Brunt.

It seems to me to necessarily follow that by the execution of the lease under the terms of the statute, an estate vested in the lessee which cannot be divested either by modification or cancellation, without the consent of its stockholders, under the terms of the statute, and which can not be reinvested in the lessor without the like consent of its stockholders.

The defendant cites *Beveredge v. N. Y. E. R. R. Co.*, 112 N. Y., 1, in support of the claim that the agreement may be modified without the concurrence of stockholders. In that case the court held that under the act of the legislature of 1829 (Chap., 218, Laws of 1839), a lease by one railroad corporation to another of its road and franchises may be made by the board of directors of the lessor, and the concurrence of the stockholders is not essential to its validity; and the court held further that the concurrence of stockholders was not essential to the validity of a subsequent agreement reducing the rent.

Chapter 218 of the Laws of 1839 of N. Y. is as follows: "It shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract. But nothing in this act contained shall authorize the road of any railroad corporation to be used by any other railroad corporation in a manner inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract."

The court, in the *Beveredge* case, in discussing the question of the necessity of the authorization of stockholders to give validity to the lease, say, on page 22, 23: "If such a contract or a lease by a railroad corporation to another of its railway, was not within the powers expressly conferred by general laws, by which, or by the charter, the corporate powers are measured, it would be *ultra vires* and could not be made at all. But as the act of 1839 authorizes the making of such contract, and the law does not regulate the manner of making it, or impose restrictions with respect to it, I think it must logically follow that the power to make it is, like all other general powers of management, lodged in the directors."

In this case the court was construing a statute which gave to the directors the power to execute a lease, and held that they could modify the lease. This is clearly the law, under the rule of law laid down in *Broom*, *supra*. But I do not think the case is applicable under the provisions

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of the law of our state further than it exemplifies the rule laid down in *Broom*.

The defendant also cites 15 Ohio St., 328; 34 Ohio St., 450; 37 Ohio St., 556; 7 Fed. Rep., 793; 1 Disney, 92, to the effect that after the election of the directors of a corporation all the business of the corporation is to be transacted by them or under their authority. But this power of the directors is, by all these cases, made subject to any restrictions which may be placed, by special enactment, on the same. The power to cancel a lease was not a power given by the charter, but grew out of the statute conferring power on the corporation to execute a lease. Its exercise by the directors should therefore be subject to such restrictions as will carry out the object of the legislature. At the meeting of the stockholders of the Muskingum Valley Co. of March 28, 1889, a majority, but less than two-thirds of the holders of stock of the company represented at the meeting and voting, assented to the action of the directors in declaring the lease cancelled. Consequently less than two-thirds of the holders of stock of the company assented to such action. Therefore, whether we consider the act of March 19, 1869, or the act of April 15, 1887, a requisite number of stockholders did not assent to the cancellation of the lease.

If it be true that a cancellation of a lease requires the assent of the stockholders under the statute, then any action taken by the lessee and the lessor companies through their directors, without such assent, would be of no moment. The act of the Pan Handle Co., on January 1, 1886, in turning the road and property over to the officers, of the Muskingum Valley Co., and the possession taken by the same by said officers, would not affect the rights and obligations of the parties under the lease. The title of the road and property under the lease would remain in the Pan Handle Co., and the rights of the Muskingum Valley Co. under the lease would remain unaffected. The action of the stockholders of the Muskingum Valley Co., at the meeting of March 2, 1886, March 22, 1887, and March 27, 1888, in approving the reports of the directors is of no avail, as it does not appear by what vote the reports were approved.

The claim made by the defendant under *Pomeroy's Eq. Juris.*, sec. 1407; 15 Mich., 381; 46 N. H., 464; 130 Ill., 44 118 Pa. St., 610, that the Muskingum Valley Co. has not complied with the terms of the contract on its part to be performed, and cannot comply with them, and that therefore it has no standing in equity, cannot be sustained, if I am right in my construction of the terms of the lease.

Under the lease it placed the road and all its property in the possession of the lessee, and complied with all the terms of the lease on its part to be performed. The road and property remained in possession of the lessee without any question for twelve years, when the lessee, of its own motion, attempted to divest itself of the same. The attempt on the part of the officers of the Muskingum Valley Co. to resume possession of the road and property in 1886 was without any authority whatever on the part of the company, and the attempt of the company in 1893 to cancel the lease was without authority of law, and the act of the officers in 1886 and the attempted action of the company in 1893 were clearly at the instance of the Pan Handle Co., and procured by its power over the Muskingum Valley Co. through the Pennsylvania R. R. Co.

The plaintiff prays that the validity, obligation and binding force of the said lease, as against the P., C., C. & St. L. Ry. Co. may be established by the court.

I think this part of the prayer should be granted.

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The plaintiff further prays that said company may be repossessed of the said demised premises and compelled during the residue of the said term of lease to maintain and operate the demised premises at its own proper cost, expense and risk, and so as to save the Muskingum Valley Co. and its stockholders harmless therefrom.

Under 13 Ohio St., 544, the court will decree the specific performance of a contract to operate a railroad only "in a case where the demand for the exercise of such a power was stringent," etc.

If the validity of the lease is established, and the obligations of its covenants are maintained as enforceable against the lessee or its successor, it seems to me that, so long as the road is operated in the manner called for by the lease, it is immaterial to the plaintiff whether it is operated in the name of the lessee or in the name of its successor, or in the name of some other company.

Further, the reasons given by Judge Gholson on p. 555, 557 of 13 Ohio St., for refusing to decree the specific performance of a contract to operate a railroad, would appear to apply to the case at bar, and they are so cogent that the court would not seem to be justified in granting this part of the prayer of the petition.

The plaintiff further prays for a judgment against the P., C., C. & St. L. Ry. Co. for the amount of the coupons in default, with interest, to be collected and distributed among the holders of the bonds and coupons. I think this part of the prayer should be granted.

The plaintiff further prays a judgment for the interest from date of maturity to date of payment on coupons maturing on and after July 1, 1885, and which were paid after respective dates of maturity.

It seems to me that the holders of the coupons in accepting payment of the same after maturity and in surrendering the coupons without any stipulation as to interest indicated their intention to accept the face of the claim in full settlement, and the court should not interfere. Therefore this part of the prayer should not be granted.

The plaintiff further prays that the P., C., C. & St. L. Ry. Co. may be compelled hereafter to advance to the Muskingum Valley Co. from time to time as the same may mature, all moneys necessary for the payment of said coupons. I think the rights of the Muskingum Valley Co. in this matter should be enforced through supplemental pleadings.

A judgment may therefore be taken finding that the attempted surrender of the road and property was without authority of law, and decreeing that the same be set aside and held for naught. And finding that the parties, in attempting to cancel the lease, had failed to comply with the law, and decreeing that the lease is, and at all times has been, a valid and subsisting lease, as against the Pittsburgh, Cincinnati & St. Louis Railway Company and its successor, The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, and adjudging that the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company pay the amount of the coupons which matured prior to the filing of the petition herein, and are in default, with interest, to the proper parties, holders of said bonds and coupons, who may appear to be entitled thereto, by proof to be taken before a commissioner, to be appointed by this court; with leave to the plaintiff, by supplemental petition to set up claims on subsequently maturing coupons.

George Hoadly and Harmon, Colston, Goldsmith & Hoadly, for plaintiff; Ramsey, Maxwell & Ramsey, and Harrison, Olds and Henderson, for defendants.

CONDEMNATION.

[Lucas County Probate Court.]

TOLEDO (CITY) V. JOHN G. BAYER.

1. The passage of the ordinance by the council places the municipal corporation in as advanced a state of procedure as a private corporation would be in after the court had determined the jurisdictional questions provided by statute as a basis for such proceedings by private corporation; and when a municipal corporation has passed an ordinance appropriating property to its own use, compensation therefor, and decrease of the value of the remainder, if any, should be made as of the date of the passage of the ordinance.
2. And if the owner, to whom compensation is to be made, uses the property within the boundary lines of a proposed street opening after the passage of the ordinance to appropriate for such purposes, he does so at his own risk and cannot recover for any improvements or erections placed thereon after the passage of such ordinance.

MILLARD, J.

October 2, 1893, the common council of the city of Toledo passed an ordinance to condemn certain property, fully set out in said ordinance and in the application filed in this court, to open Islington street from Cherry street to Fulton street, etc.

A portion of this property was owned by the defendant, John G. Bayer, and was then, and is still, used by him in his business of florist and market gardener. Some time during the months of October or November 1893, and after the passage of the above ordinance by the city council, Defendant Bayer took down certain hot-houses or green-houses, which stood partly on the land proposed to be taken by the city, and partly on the adjacent land owned by defendant and reconstructed them, one entirely on the land proposed to be taken by the city and the other with some five or six feet of its entire length upon such land, or within the line of the proposed street. The first is known in this proceeding as the "Parsley House" and the second, or one partly within the lines of the proposed street, as the "Violet House."

An old boiler was also brought from some other point and placed in the boiler house within the lines of this proposed street.

Upon inquiry as to the value of this boiler, objection is raised by the council for the city, who make the claim that the city of Toledo, when it passed the above ordinance, thereby appropriated said property to its own use, and that compensation is to be made by the jury for property taken and decrease of value of the remainder, if any, as of the date of the passage of that ordinance. That if the owner to whom the compensation is to be made, uses the property within the boundary lines of a proposed street opening after the passage of an ordinance to appropriate for such purpose, he does so at his own risk and cannot recover for any improvements or erections placed thereon after the passage of such ordinance.

In considering this question it is necessary to keep in mind that actions by municipal or public corporations are governed by a distinct and separate provision of the constitution from those by private corporations and that many of the requirements of the statutes authorizing appropriations by private corporations, as railroads etc., do not apply in cases by municipalities.

Section 19, article 1, constitution provides that "private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner in money; and in all other cases where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury; without deduction for benefits to any property of the owner.

It is under this article of the constitution of Ohio, that these proceedings in which we are now engaged, are brought. Proceedings of like nature by private corporations are maintained by virtue of sec. 5, art. 13 constitution, which reads as follows:

"No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

Under the power conferred by the constitution the legislature has passed a code of laws pertaining to appropriation proceedings, and while the acts under the different sections of the constitution are distinct, the provisions for appropriations by private corporations appear to have received more careful consideration or definite expression, of the law-makers, and the duties of the appropriating party are more clearly and fully set out in the statutes, than those of public or municipal corporations.

By looking at some of the provisions for private corporations we get some light, perhaps, on the more obscure portions of those governing the public corporations.

By referring to Tit. II, Chapter 8, of the Revised Statutes—being the div. relating to appropriation of property—we read.

Section 6414. Appropriations of private property by corporations must be made according to the provisions of this chapter.

Section 6415 says what shall be done when corporations cannot agree with owner.

Section 6416 provides for filing a petition with court, when parties cannot agree and what it shall contain, and requiring that the same close with a prayer for the appropriation of the property.

Section 6417 provides for cases when property lies in two or more counties.

Section 6418 provides for summons and service on parties, and 6419 for method of service upon non-resident owners and for time of hearing.

Section 6420. On the day named in any summons first served, or publication first completed, the probate judge shall hear and determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation.

Upon these questions the burden of proof shall be upon the corporation, and any interested party shall be heard.

Section 6421 provides for order to clerk and sheriff to draw sixteen names from the jury box, etc.

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The succeeding sections provide for trial, amendments, adjournments, filling of pannel, challenges, oath to jurors, view of premises, papers to go with jury, witnesses, proceeding when structure is partly on land sought to be appropriated, verdict, when and how corporation may have possession, when and how corporations may abandon proceeding, and when action may be brought for costs and expenses.

Section 6436 provides for new trial, and the subsequent sections relate wholly to independent matters, and section 6448 gives owner the right to institute proceedings to condemn when corporation has taken possession and is using land which has not yet been appropriated.

Section 6453. Is the last of the chapter on appropriations and is as follows :

The provisions of this chapter shall not apply to proceedings by state, county, township, district or municipal authorities, to appropriate private property for public use, or for roads or ditches ; and in all such cases it shall be optional with such authorities to pay the judgment rendered against them according to section 6432, or to pay the costs and decline to take the property sought to be appropriated.

Section 6432 referred to in the last above reads as follows :

The jury shall render its verdict in writing, signed by its foreman, to the judge, who shall cause it to be entered on record ; and unless for good cause shown, upon motion to be filed within ten days after the verdict is rendered, a new trial be granted, the judge shall enter a judgment confirming such verdict.

The foregoing is the general law regulating appropriations, and is varied only by special statutes which we will consider later.

Turning to Tit. XII, Div. 7, Ch. 3, relating to "appropriations by cities and villages of private property to public use."

Section 2232. Each city and village may appropriate, enter upon and hold, real estate within its corporate limits for the following purposes, but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is applied : 1. For opening, widening, straightening and extending streets, alleys and avenues ; and for twenty other purposes.

Section 2232 gives power to appropriate for opening streets across railroad tracks, etc.

Section 2234. No improvement requiring proceedings for the condemnation of private property shall be made without the concurrence in the by-law, ordinance or resolution directing the same, of two-thirds of the whole number of the members elected to the council. 66 v. 236.

Section 2235. When it is deemed necessary by a municipal corporation to appropriate private property, as hereinbefore provided, the council shall, by resolution, declare such intent, defining therein the purpose of the appropriation, and setting forth a pertinent description of the property designed to be appropriated ; and on the passage of such resolution the yeas and nays shall be taken and entered on the record of the proceedings of the council. 66 v. 236.

Section 2236. Upon the passage of the resolution by the requisite majority, application in writing shall be made to the court of common pleas of the proper county, or to a judge thereof in vacation, or to the probate court of the county, which application shall describe as correctly as possible, the property to be taken, the object proposed, and the name of the owner of each lot or parcel of the property. 66 v., 236.

This section of the statute, when compared with sec. 6416, providing for appropriation of property by private corporations, shows the indefiniteness before mentioned, of the provisions of the distinct acts, which characterize the statutes for appropriation by public corporations, or those under sec. 19, art. 1, constitution.

By sec. 6416. The Appropriating corporation is compelled to file a petition, duly verified; a special description of the property sought to be appropriated, the work to be constructed thereon and sundry other matters, and to wind up with "a prayer for the appropriation of the property."

While by this section 2236 the only requirement is that application in writing shall be made to the court of common pleas, or a judge thereof in vacation, or to the probate court in the county, which application shall describe as correctly as possible, the property to be taken, the object to be proposed, and the name of the owner of each lot or parcel of the property.

A very few words more, providing for a prayer of their desire, would have saved much perplexity.

Section 2237 provides for notice to be given personally in the ordinary manner of legal process, to all owners or agents resident within the state whose place of residence is known, and for publication to others etc. of the time and place of making the application provided for in section 2236.

Section 2238. If it appear to court or judge that such notice has been served five days before the time of application, or has been published as provided in the preceding section, and that such notice is reasonably specific and certain the court or judge may set a time for the inquiry into and assessment of compensation by a jury of twelve men, unless all the parties agree upon a less number, who shall be duly sworn to discharge that duty. 66 v., 236.

Section 2240 provides for drawing a jury, filling pannel from bystanders, etc.

Section 2241 provides "the inquiry and assessment shall be made at the time appointed, unless for good cause, continued to another day."

Section 2242 provides for a view of premises by jury.

Section 2243 provides for the appointment of guardian ad litem in proper cases.

Section 2244. For a more full and accurate description of lots etc., when desired.

Section 2245. For mode of assessing by jury and opening and closing case by counsel and other rules.

Section 2246 relates to a verdict in whole or in part.

Section 2247. When the assessment has been made by the jury, the court shall make such order as to payment or deposit by the corporation as may seem proper; such order shall designate the time and place of payment or deposit, the person entitled to receive payment, and the proportion payable to each; and the court may require adverse claimants for any part of the money or property, to interplead, and fully determine their rights in the same proceeding.

Section 2248. The court may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce an order giving possession. Other sections down to 2260 provide for special features, error, appeal etc., but

Section 2260 provides that, when a municipal corporation makes an appropriation of land for any purpose specified in this chapter, and fails to pay for or take possession of the same within six months after the assessment of compensation shall have been made, as hereinbefore provided, the right of the corporation to make such appropriation on the terms of the assessment so made, shall cease and determine; and any land so appropriated shall be relieved from all incumbrance on account of the proceedings in such case, or the resolution of the council making the appropriation; and the judgment or order of the court, directing such assessments to be paid, shall cease to be of any effect, except as to costs adjudged against the corporation.

By reference to chapter 13 Div. 8 Tit. XII being the chapter relating to streets. We find the latest of the laws affecting street openings.

Section 2642. When it is deemed necessary by the council of any municipal incorporation to open, extend, straighten, narrow or widen any street, alley, or public highway within the limits of such corporation, the council shall provide by ordinance for the same; such ordinance shall briefly, and in general terms, describe the property, if any, to be appropriated for such purposes; and the proceedings for such appropriation shall be as provided in chapter three; division seven of this title, 70 v. 127.

This last section, 2642 is at variance with sections 2234 and 2235 of the general provision of chapter 3, division 7, but the usual and well known rule applies here, for construing statutes, that when there is a general provision in regard to the method of procedure regarding several subjects, followed by a special provision as to the procedure in regard to one or more of the subjects, the special provision will govern.

We see by this review of the statutes, and the constitutional provisions on which they are founded that widely different action by or in court is required when a municipal corporation seeks to take private property from what is required of a private corporation.

Should a railroad company, for instance, desire to take for a right of way this same property now sought for Islington street, it would have to file a duly certified petition, with proper prayer, etc. Then would follow proof to court of the legal existence of the corporation desiring to appropriate; its right to make the appropriation; its inability to agree with the owner, and the necessity of the appropriation.

In establishing these four jurisdictional facts, the burden of proof would be on the corporation, and any interested party would have a right to contest any or all, and should the corporation fail to show to the court of the existence of any of these, it would fail to make its case and the action would be dismissed by the court.

In the case now before us, of the municipal corporation desiring this same property for a public road, none of these jurisdictional facts or the preliminary steps leading up to the action of the court are left to the discretion of court; but on the contrary the right, the necessity, and the inability to agree are all determined by the common council before applying to court. The council provides for the appropriations by ordinance, briefly and in general terms describing the property required.

The passage of the ordinance by the council places the municipal corporation in as advanced a state of procedure at least as a private corporation would be after court had determined in its favor the jurisdictional questions. The next step for the municipal corporation is to file an application, instead of a verified petition, with court, in which shall

be described as correctly as possible the property to be taken, the object proposed, and the name of the owner of each lot or parcel of land, and a subsequent provision is made for notice to parties of time of hearing. The first action required of court is when, as provided in section 2238. If it appears to court or judge that the requisite notice has been given parties five days before the time of application, or publication duly made, and that such notice is reasonably specific and certain, the court may set a time for the inquiry into and assessment of compensation by a jury of twelve men, unless all parties agree upon a less number. In case of a railroad or other private corporations the law requires sixteen names drawn from jury box, and so, as although, there is a perfect separation of requirements as to the two classes of corporations.

After the submission to the jury and verdict rendered the divergence between the two classes of corporations is even more marked. In the case of private corporations appropriating property, the court has nothing to do with contesting claimants to the land or proceeds of property appropriated, while in the case of the municipal corporation, the court can order as to the payment or deposit of money as it sees fit and can order adverse claimants to interplead and fully determine their rights in the same proceeding. The court can also direct the time and manner of taking possession of the property and enforce its orders as to possession.

If no order is made the municipality must take the property within six months after the assessment of compensation or its rights cease and determine, and in the language of section 2260, any land so appropriated shall be relieved from all incumbrance on account of the proceedings in such case, or the resolution of the council making the appropriation.

I have dwelt on the provisions of the constitution and the appropriation statutes thereunder, as they are the source of all rights and obligations, and because so very few decisions have been made on the point involved by courts of Ohio.

The determination of courts of other states can help us but very little, as we know not their constitutional or statutory provisions. My study has carried me clear from my former ideas on the effect of the ordinances passed by the council and of the part the court had to do in appropriation cases; and as I now read section 19, art. 1 constitution, and the sections of the statutes regulating the appropriations by municipal corporations, a new light is given and much that was before ambiguous disappears. By dropping out of the constitutional provision the words not necessary in this particular case, it will read, "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner in money."

That the law makers have considered that when a municipal corporation wanted land for opening a street, etc., they appropriated it by resolution or ordinance duly passed by the council for that purpose is apparent in all the acts regulating the subject, and that the jury provided for is only required to assess the compensation for such property so appropriated is equally clear. Read portions or all of a few sections in this point of view.

Section 2232. Each city and village may appropriate, enter upon and hold real estate within its corporate limits * * * for opening, widening, straightening and extending streets, alleys and avenues.

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Section 2235. When it is deemed necessary by a municipal corporation, to appropriate private property * * * the council shall, by resolution declare such intent, defining therein the purpose of the appropriation, etc., etc.

Section 2238. If it appears to court * * * that notice has been served five days before the time of the application * * * the court or judge may set a time for the inquiry into and assessment of compensation by a jury, etc.

Section 2260. When a municipal corporation makes an appropriation of land * * * and fails to pay for or take possession of the same within six months after the assessment of compensation shall have been made * * * the right to make such appropriation on the terms of the assessment * * * shall cease and determine, and any lands so appropriated shall be relieved from all incumbrance on account of the proceedings in such case, or the resolution of the council making the appropriation.

That this was the view taken by Judge Saylor of the Hamilton county common pleas court, is evident from his decision in *Cincinnati v. Stribly*, 11 O. D. Re. 000, when he says, "In an action to assess the compensation to property owners for the appropriation of their property by municipal corporations for public street purposes, compensation shall be awarded for its value at the time of the passage of the condemnation ordinance. The same line of determination is recognized in the discussion by court in the case of *Taylor v. Columbus*, by Franklin county circuit court, at January term, 1892, 3 C. D., 427. As to the contention of counsel, that this view is wrong because "it would be taking the property from a citizen without his having his day in court," we find that this view was discussed and decided in the case of *Strauss v. Cincinnati*, 11 O. D. Re., 92, of *Cincinnati*, as was the same question by Judge Taft in the case of *Longworth v. Cincinnati*, 10 O. D. Re., 683.

The subject of the constitutionality of this mode of taking property is also discussed and upheld in the case of *Caldwell v. Carthage Village*, 49 O. S., 334 and is there held that this is not a "taking of property without due process of law."

If these views are right the city appropriated this property for Islington street opening, on October 2, 1893, and improvements made thereon after that date were so made at the risk of the party so placing them. While this view may work a hardship for the owner, the same will arise, not from the fault of the law as interpreted by our courts, but from the owner not understanding the law, and as I see no way to avoid this conclusion, compensation will be awarded as of October 2, 1893.

CONSTRUCTION OF A WILL.

[Lucas Common Pleas, April Term, 1894.]

PATRICK A. MACGAHAN, GUARDIAN, v. SEBASTIAN KLEINER ET. AL.

H. by her will gave all her property after the payment of her debts and certain legacies to her eight children to be divided between them equally. By the last clause of the will she directed that her property shall not be divided until the youngest child becomes of age and that all expenses for the natural support or education of the two youngest children shall be paid out of the proceeds of her estate as a whole. Held, That the rents and profits or income of her entire estate, until the youngest child becomes of age, may be used, so far as necessary, for the support or education of the two youngest children, but that no part of the principal can be used for such purposes.

PUGSLEY, J.

This action is brought by the plaintiff as guardian of Rosie Harbauer and Charles Harbauer, minors, to obtain the judgment of the court as to the proper construction of the last will and testament of Catharine Harbauer, deceased. The testatrix died on December 2, 1890, leaving eight children two of whom are the said minors. Her will was executed on July 1, 1890. By the first clause of the will she directed that her debts be paid out of her real estate. By the second clause she gave to her four youngest children \$50.00 each and all the household furniture in equal shares. By the third clause she gave all the rest and residue of her real estate and personal property of every description to her eight children (naming them) in equal shares. By the fourth clause she appointed Sebastian Kleiner, executor. The last clause is as follows: "My real estate and personal property, however, shall not be divided until the youngest child, Rosie Harbauer, shall have reached her 18th year and all expenses for the natural support or education of the youngest two children, Charlie and Rosie Harbauer, shall be paid out of the proceeds of my estate as a whole."

It is alleged in the petition that the income from said entire estate after paying the expenses of managing the estate is sufficient for the support and education of said minors and that by the provisions of said will all the property of the testatrix should be sold and converted into money and the proceeds thereof applied, so far as is necessary, to pay all reasonable expenses in the support and education of said minors. The plaintiff asks for the direction and judgment of the court as to the true construction of the will and as to the rights of all parties in the estate of the decedent.

In the construction of a will the intention of the testator must govern, and the intention is to be gathered from the language used and all parts of the will are to be read and construed together in the light of the circumstances under which the will was executed. Upon a consideration of the whole will and the evidence submitted by the parties, I am of the opinion that it was not the intention of the testatrix that the property should be sold and the proceeds of such sale applied to the support of the minors, but that the words "the proceeds of my estate as a whole" mean the rents and profits or income of the entire estate, in other words, such proceeds as may be derived from the property consistently with the devise of the property to all the children. Such a construction gives effect to each and all of the provisions of the will and to the general in-

tent of the whole will, and is supported by the following considerations:

1st. The word "proceeds" is a word of equivocal import. It does not necessarily mean what results from the sale of property. It may mean the income of property or what results from the renting or investment of property. Its meaning in each case depends upon the connection in which it is employed and the subject matter to which it is applied. *Thompson's Appeal* 89 Pa. St., 36; *Hunt v. Williams*, 126 Ind., 493. There is no direction in the will that the property shall be sold to furnish support for the minors. The support is charged not upon the property but upon the proceeds of the property and nothing is said about selling it in order to obtain "proceeds."

2nd. The words, "my estate as a whole" mean "my estate all together" or "my estate not in parts or parcels but as a whole." If, therefore, the word "proceeds" means the proceeds of a sale, the estate as a whole must be sold, whether necessary or not for the support of the minors, because the expenses of support must be paid out of the proceeds of the estate as a whole. Such a construction ought not to be adopted, unless it is unavoidable. On the other hand the words "out of the proceeds of my estate as a whole" are consistent with the intent that the property shall be kept together and be made as productive as possible and that the expenses of support shall be paid out of the produce or income thereof.

3rd. In express terms there is a definite devise of all the property to the eight children to be divided equally between them when the youngest child becomes of age. Apparently from the language used the enjoyment of all the property by all the children after the youngest child becomes of age, was as much in the mind of the testatrix as the support of the minors until the youngest child becomes of age. Both purposes are carried out by giving to the minors for their support the income of the entire property until the time for division shall arrive. The last clause of the will modifies the third clause only by postponing the division of the property until the youngest child becomes of age, and by providing what shall be done with the proceeds that accrue from the property in the mean time. In all other respects the third clause is unaffected by the last clause.

4th. The circumstances surrounding the execution of the will support this view. All of the children were then supporting themselves or were able to support themselves, excepting the youngest child. In view of the circumstances in life of the testatrix and her family and of the character and condition of her property and of the manner in which the other children had been brought up, as shown by the evidence, there can be no reasonable doubt that she believed the income of her property to be ample for the support and education of the minors in the same manner and to the same extent that the other children had been supported and educated.

Counsel for plaintiff cited and relied upon the case of *Bierce v. Bierce*, 41 O. S., 241. In that case the testator directed that after the death of his wife all his property then remaining shall constitute a fund for the support and maintenance of his daughter and her children during her life and at the death of his daughter, the same shall be equally divided between her children. It was held that the "fund" so constituted was charged with the support and maintenance of the daughter and her children as its primary object and that if the income proved insufficient, the principal could be resorted to for proper support. The court say, "The

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words 'shall constitute a fund' are full of meaning. The word 'fund' savors of personalty. It means something that can be invested and re-invested. The support was expressly charged upon this fund, without any word indicating that the charge was to be limited to the income of the fund." And in answer to the claim that the charge ought to be limited to the income of the fund, because the will directs that upon the daughter's death "the same shall be equally divided between her children," the court say, "A fund charged with the support of A, for her life does not cease to be a fund, because some of its principal is necessarily consumed in supporting A. Hence, the words, 'the same' are not so definite as to require or even to justify a denial of needed support to the daughter and her children during her life." This case is distinguishable from the case at bar. There the support was charged upon the property.

"The property shall constitute a fund for the support of the daughter," is the language of the will. It amounted to a devise of the property to the daughter for her support during her life. Here the support is charged not upon the property or its equivalent the fund, but upon the proceeds of the property.

Again in the case cited the property was first to be applied to the support of the daughter during her life, and upon her death to be divided among the children. The support of the daughter was apparently the primary object of the testator. Here there was in the first instance a direct and definite devise of all the property to all the children. This was made subject by the latter clause to the provision that it should not be divided until the youngest child becomes of age, and that the support of the minors should in the meantime be paid out of the proceeds of the property. It cannot be said here that the support of the minors was the primary object of the testatrix. The judgment of the court is that by the will only the income of the estate can be applied to the support and education of the minors.

E. O. King and P. A. MacGahan, for the plaintiff.

J. E. Pilliod and F. M. Dotson, for the defendants.

SEWER ASSESSMENTS.

[Lucas Common Pleas Court, March, 1894.]

A. E. MACOMBER v. S. A. HUNTER, TREAS.

The only limitations upon the amount of sewer assessments are those contained in the subdivision specially relating to sewers.

In this case it was held that sec. 2271, Rev. Stat., which provides that "the assessment specially levied upon any lot for any improvement shall not exceed 25 per cent. of the value of such lot," does not apply to sewers, and that the only limitations upon the amount of a sewer assessment are those contained in the subdivision specially relating to sewers.

Toledo v. Bank and Trust Co.

ASSESSMENTS.

[Lucas Common Pleas Court, February 26, 1894.]

TOLEDO, FOR USE, ETC., V. TOLEDO SAVINGS BANK AND TRUST CO.

The improvement of a street by first paving and afterwards by building a sidewalk does not come within sec. 2283 Rev. Stat., which statute applies only to property abutting on one street and assessed for an improvement there, and afterwards assessed for improvements on another street.

LEMMON, J.

This case involved a construction of sec. 2283, Rev. Stat., which placed additional restrictions on assessing property for improvements. The court held that the section applied only to property abutting on one street and assessed for an improvement there, and afterwards assessed for the improvement on another street; and that the improvement of a street by first paving and afterwards by building a sidewalk, did not come with the provisions of sec. 2283.

That section states, in placing additional restrictions on assessing property in cities, that it shall not be assessed, beyond a certain limit, for making improvements "on two streets or avenues within a period of five years." Held, that if the law had contemplated limiting the assessment on one street, in the manner urged by counsel, the words "on two streets" would have been omitted.

ASSESSMENTS.

[Hamilton Common Pleas Court, March, 1894.]

TURNER V. CINCINNATI.

The frontage of a lot is determined by reference to the manner of its principal use and occupation. A lot occupied by a building used for a store and dwelling, with a large entrance door and show window fronting on one street, and a door for entrance to the dwelling portion on another, will be deemed to front on the street occupied for the main or store entrance.

SAYLER, J.

The plaintiff was the owner of a lot lying on the northwest corner of John and David streets, being twenty feet on John street and 81.70 feet on David street.

David street had been improved under proceedings duly taken, and all assessment to pay expense of the improvement had been made on said lot at \$— per foot for its entire length on David street.

The plaintiff claimed that the assessment should be at said rate on but twenty feet, and cite *Haviland v. Columbus*, 50 O. S., 471.

The court say: "I am satisfied that the lot fronts on John street. It is claimed, however, by the defendants that the lot is built upon, used and occupied with reference to David street, and that it should, therefore, be assessed for its full length: Citing the *Haviland* case, also *Sandrock v. Columbus*, 6 C. D., 617. The part of the building on John street is used as a store, with large entrance door and show-window. In the part

of the house on David street are four windows and a door on the first floor. It seems to me the building is used and occupied with reference to John street—that is, the business part of the building. The door on David street, for entrance to the dwelling portion of the building, is incidental to such uses of the building on John street.

"In *Sandrock v. Columbus*, supra, the court say, the Supreme Court held in the *Haviland* case that a corner lot may not have two fronts. If that be correct, clearly the John street part of the lot is the front.

"It appears, in the *Sandrock* case that two houses were built fronting on the lengthwise side of the lot. I think, therefore, the reason in that case is not in point in this case.

"I think the plaintiff is entitled to the relief asked; that the assessment should be on twenty feet only."

Decree accordingly.

Peck & Shaffer, for plaintiff.

W. H. Whittaker for the city.

INJUNCTION.

[Lucas Common Pleas Court, May, 1894.]

J. A. BARBER, PROS. ATTY., v. COMRS. OF LUCAS COUNTY ET AL.

County commissioners are not necessarily prohibited from expenditure of money for services of persons necessarily employed for a special purpose, although the statute contains no express provision for such employment. And, as no suspicion of collusion or fraud attached to the proceeding, court declines to interfere by injunction.

LEMMON AND HARMON, JJ.

Proceeding instituted by Prosecutor Barber to enjoin the county commissioners and courthouse board from entering into a contract with a Cincinnati firm, E. W. Hutton & Co., for a sale of the courthouse four per cent. bonds, amounting to \$500,000. By the terms of this contract the county commissioners agreed to pay Hutton & Co. a commission of two per cent., or \$10,000, if a bona fide bid of at least par and accrued interest was secured and presented on the 20th inst.; they also agreed to allow Hutton & Co. a further commission of \$2,500 for a bid in advance of par and accrued interest, if the premium offered amounted to that much; if it amounted to more than \$2,500 the county should receive the excess. The contract also provided that if Hutton & Co., by securing a bona fide bid for the bonds, were instrumental, presuming they would necessarily be so, in selling the bonds to other parties or a higher bidder, they should receive the commission of two per cent., the same as though the bid secured by them took the bonds. It provided also that the commission should be paid as soon as the bonds were taken. To determine whether or not the commissioners had power to make such a contract or dispose of the bonds in that way, an action was commenced, and a preliminary injunction allowed.

In a hearing on a motion to dissolve that order, the commissioners presented their reasons for the steps they had taken. They, as well as members of the courthouse board, Judge Millard and other officials, testified to the experience of the last few months in trying to sell the bonds.

The securities had been advertised twice, and no bids received: Representatives of bond syndicates stated that the bonds could not be sold for less than $4\frac{1}{2}$ per cent.; that this meant an additional expense to the county of \$125,000; on the whole. It appeared from the testimony that the commissioners had given up hope of selling the bonds in the ordinary way, and could do so only by employing brokers to negotiate them.

The question involved for the court was whether, from the statute providing for a sale of the sureties, power was conferred authorizing such an expenditure or such a contract. Defendants urged that while the statute contains no express provision for such a sale or contract, it contemplated authorizing the commissioners to do what might be necessary for the best interests of the county.

After hearing the evidence and arguments, and after a short consultation an order was made dissolving the injunction. The court said that in many departments of the county, if officials were confined to powers expressly conferred, many things which it is absolutely necessary to do could not be paid for; that every day saw some act done for which there was no express provision, but for which the county should pay; that the court had heard the testimony of men who had the confidence of the people, and was satisfied of their conscientious regard for the interests of the county; that no suspicion of collusion or fraud attached to the proceeding.

For these reasons the court thought that it was not an occasion where the extraordinary remedy of an injunction should be allowed.

DEBTOR AND CREDITOR.

[Athens Common Pleas Court, June, 1894.]

NATIONAL CASH REGISTER CO. V. BORN & CO. ET AL.

An action to foreclose vendor's lien is not a taking possession of property whereby the vendee or a judgment creditor acquires a right to a tender or a return under the conditional sale act, sec. 7913 Rev. Stat.

DESTEIGNER, J.

The National Cash Register Co. sold a national cash register to F. with written agreement between vendor and vendee providing, "It is agreed that the title of the said cash register shall not pass until the same is paid for in full and shall remain your property until that time." Possession was delivered to the vendee, and part of the purchase money was paid and part remained unpaid, and a copy of said agreement was filed in the clerk's office where said property was situate as provided by law.

Born & Co., judgment creditors, seized the register on execution; the vendors brought a suit in the court of common pleas to enforce in equity the lien of the unpaid purchase money amounting to the sum of \$55, and for the sale of said cash register, and to enjoin Born & Co. from selling said register on execution. Born & Co. answered setting up their levy, and insisted to the court, under the provisions of the Rev. Stat., 7913-72 and 7913-73, act of May 4, 1885, and known as the Conditional Sales Act of personal property, that they were entitled, under the last section quoted, to a sum not exceeding 50 per cent. of the amount paid, deducting therefrom reasonable compensation for the use of said property.

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It was held that the bringing of the suit in equity to foreclose the vendor's lien for the unpaid purchase money, was not taking possession of said cash register, but in the meaning of the law of said act, that no tender by the vendor to the purchaser, offering to return said purchase money, in an amount not exceeding 50 per cent. was necessary, and that the levy of the judgment creditor only held force to the amount the purchaser would have after payment of costs and the claim of the unpaid purchase money of the vendor. Distribution ordered accordingly.

TAPPING TELEGRAPH WIRES.

[Franklin Probate Court, August, 1894.]

MARTIN AND KENDALL V. SHERIFF, HABEAS CORPUS.

1. It is not a crime, under the laws of Ohio, to tap a telegraph wire.
2. A strict construction of the statutes require that not only should the wire be unlawfully tapped by an unauthorized person but also that a communication or message should be taken therefrom in an unauthorized manner.

HAGERTY, J.

The writ was asked for the reason that no crime had been committed for which defendants were bound over by the police court. The affidavit on which the prisoners were held, charged substantially that, the defendants did unlawfully tap a telegraph wire. The court held, among other things, that it was no crime, under the statutes of Ohio, to tap a telegraph wire; that a strict construction of the statutes would require that, not only should the wire be unlawfully tapped by an unauthorized person, but also that a communication or message should be taken therefrom in an unauthorized manner.

The statutes seem to be in a bad condition in regard to interfering with telephone or telegraph wires. March 2, 1892, the old law had been amended, and on March 15th, the same year, the act of March 2, 1892, was repealed. And on April 27, 1893, the law that had been repealed on March 2, 1892, was amended, and on this amendment these prisoners seem to have been held. The court did not pass upon this part of the law, i. e., whether a repealed law could be amended. The writ was allowed and the prisoners discharged.

ORDINANCES—DOW LAW.

[Columbus Police Court, August, 1894.]

COLUMBUS (CITY) V. SCHAERR.

1. A municipal corporation in Ohio has no power to legislate upon the liquor question except as provided in the Dow law, 83 O. L., 157.
2. A Sunday saloon-closing ordinance which fails to make exceptions, provided in the Dow law, for exclusively known medicinal pharmaceutical or sacramental purposes, contravenes the general policy of the state and is void.

FAIRBANKS, J.

"It is a settled principal that municipal corporations have such powers only, as are expressly conferred by statute, together with such incidental powers as may be necessary to carry the granted powers into effect. The statutes of the state bear the same relation to a municipal corporation that the federal constitution does to congress. The power to legislate upon a particular subject and in relation to a particular thing must be expressly delegated or it does not exist."

"Express authority must be found in the statutes of Ohio to uphold the provisions above quoted, or they are invalid. A municipal corporation cannot assume to act under any general grant of authority by virtue of its incidental powers and pass an ordinance which conflicts with the spirit or is inconsistent with the policy of the state as provided by its general legislation. It is claimed by counsel, in support of the demurrer, 'That the provisions of the ordinance above quoted are void, because those ordinances and provisions are repugnant to and in conflict with the declared statutory policy of the state upon the subject to which they relate.' A municipal corporation in Ohio has no power to legislate upon the liquor question, except as provided in the 'Dow law' (83 Ohio L., 157)."

"That act specifically repealed section 5941 of the Rev. Stat., which provided that it was an offense to sell liquor to be drank where sold, and it also repealed by implication and superceded all other statutes in effect previous to its enactment, such as paragraph 5, of section 1672, of the Rev. Stat., under which municipal corporation had power 'to regulate ale, beer and porter houses and shops,' which provisions had been for many years upon the statute books."

"Section 11 of the Dow law gave the council of the city of Columbus power to 'regulate, restrain and prohibit,' and it was pursuant to that power that the city council passed the ordinance in question. But the ordinance does not contain the exception provided for in sec. 8, viz: 'or for exclusively known medicinal, pharmaceutical or sacramental purposes.' These exceptions are a limitation upon the power delegated by the Dow law. The exceptions are as much a part of the state policy as is the power conferred upon council."

The court quoted the case of the City of Canton v. Nist, 9 O. S., 439, who was convicted of having opened his grocery on Sunday. The ordinance contained no general exceptions in favor of necessity, charity or creeds, but attempted to compel the observance of Sunday by Jews and Christians alike. The ordinance was held inconsistent with the laws and policy of the state by the Canton court. Acting Judge Fairbanks said the doctrine laid down in this case has never been questioned so far as the law in Ohio is concerned.

"The Dow law by a specific limitation in secs. 8 and 11 provides that municipal corporations shall not prevent the sale of liquors for exclusively known medicinal, pharmaceutical or sacramental purposes. By failure to except the sale of liquors for these purposes in the provisions of section 53 of the ordinance of the city of Columbus the city of Columbus has prohibited the sale on Sunday for such purposes under heavy penalties. And in doing so the council has exceeded the power in it vested, and has contravened the general policy of the state as declared in the Dow law, and has rendered that section of the ordinance null and void."

"It has been claimed that the defendant has no right to object to the validity of the ordinance unless he shows that beer was given away by

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him was for exclusively known medicinal, pharmaceutical or sacramental purposes. This claim is not well founded. Ordinances may be void in part and valid in part, but no ordinance defining a misdemeanor can be valid with respect to one class of citizens and void with respect to others. The defect in this ordinance may be readily remedied by the council by amending section 55, excepting from its operation the sale of intoxicating liquors 'for exclusively known medicinal, pharmaceutical or sacramental purposes.' In the meantime the state law provides a much heavier penalty for the same offense and may be appealed to should it become necessary. The demurrer is sustained and the defendant is discharged."

USURY.

[Cuyahoga Common Pleas Court, July, 1894.]

GEO CONOVER v. A. LeROY AND S. S. RUTTER.

Where interest is paid at the rate of sixty per cent., and then at the lender's request the borrower renews the note and mortgage, but to another person, and after paying the latter at the rate of sixty per cent. again renews to a third person, but at the former lenders request, the court will deem the lenders to be co-conspirators, and the transaction as a single one, and, the defendants being non-resident or insolvent, will enjoin collection.

ONG, J.

This case is before the court on a motion to dissolve the restraining order heretofore allowed by the court, restraining the defendants from attempting to collect a given amount claimed to be due them on a promissory note, and secured by a chattel mortgage upon the household and kitchen furniture of the plaintiff. The facts in brief are as follows: The plaintiffs, on January 19, 1892, executed and delivered to the defendant, S. S. Rutter, their certain promissory note for the sum of \$275, payable in thirty days from the date thereof. No rate of interest was stated in the note. A chattel mortgage was given by the plaintiff to the defendant, Rutter, upon household and kitchen furniture belonging to the plaintiff. At the time the loan was made, \$11 was deducted therefrom; or rather, the note called for \$275, while there was but \$264 in money paid. Commencing with February 19, 1892, the defendant paid on said loan the sum of \$11 monthly thereafter, until April 1, 1893, making a total payment of \$160. On or about April 1, 1893, the defendant, Rutter, asked for a renewal of the old mortgage and note for the sum of \$275, which was executed by the plaintiffs, and they again paid at the rate of \$11 per month on said loan to November 1, 1893, which amounted to \$88, making a total of \$248 paid upon the loan of \$275. On November 1, 1893, Rutter again requested a new note and mortgage for the same amount, when the plaintiff declined to execute another note and mortgage, it being represented to them, however, by Rutter that the last note and mortgage was to be made in the name of another and different person from himself. When plaintiffs declined to execute the last note and mortgage thereafter, to wit: December 13, 1893, Rutter wrote to the plaintiffs the following note:

"I hereby demand the goods mortgaged to me and itemized in mortgage given April 1, 1893. I demand them by virtue of my mortgage.

A. LeRoy, by S. S. Rutter, his Agent."

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After some negotiations and interviews between the parties as well as their counsel, the petition was filed in this action, and the restraining order issued, which is now asked to be dissolved. The defendants, LeRoy and Rutter, filed separate answers in this action, admitting substantially the allegations of the petition, averring they are separate persons, not interested jointly in the respective loans, and therefore the restraining order should be dissolved so as to permit Le Roy to enforce the collection of the balance of the last note executed as hereinbefore indicated as due him, which balance LeRoy says amounts to \$135.89, with interest at eight per cent. from April 1, 1893, while the plaintiffs contend that there is due on said loan from them to the defendant the sum of \$51.11 only, and furthermore they say on December 18, 1893, they duly tendered to S. S. Rutter that amount.

The question to be determined by the court under the pleadings and proof is almost purely one of fact, and the proper solution of the case depends largely upon the facts as found by the court as to whether or not the loan of \$275 to the plaintiffs was in fact from one and the same person, or from LeRoy and Rutter as separate individuals, because, if the loan of \$275 as claimed to have been made by Rutter to the plaintiffs, was afterwards fully discharged, paid in money, by the money furnished by LeRoy, then whatever usurious interest may have accrued or been paid by the plaintiffs to Rutter, LeRoy would not be chargeable with; whilst, if on the other hand it is one and the same transaction or party, and is treated as separate loans, then LeRoy, the real defendant, would be permitted by this arrangement to receive and hold the sum of \$160 as usurious interest, for the reason that when the plaintiffs afterward borrowed \$275 to discharge that indebtedness, the money thus borrowed from LeRoy was handed substantially to the defendant, Rutter, and then the plaintiffs paid interest to the amount of \$88 on the second loan thus obtained.

The question is one that has given the court not any particular trouble in its solution, but a good deal of concern and thought as to its opinion in this case. After a careful examination of the matter, I am clearly satisfied that Rutter, LeRoy and C. E. Caleyron are in interest one and the same person; that LeRoy is the party furnishing all the money, and Rutter is the hireling of LeRoy to do the many disreputable and reprehensible things done in this transaction in order to procure from the plaintiffs this large amount of usurious interest under the cover and guise of a pretended separate fund and separate interest. I am at a loss to know just what part in this unholy combine and make-up the man Caleyron plays. For instance, it is contended by Rutter that in the first instance he loaned the money as his own, and that when the time came when he wanted the loan taken up he secured the money from Caleyron, who represented LeRoy, but who being absent a great deal of his time in Indiana, as an iron and steel manufacturer, he, Caleyron, in turn employed Rutter to represent him, and in so doing represented LeRoy, and therefore LeRoy's money furnished the last loan, while he furnished the first. As I see and understand the matter, LeRoy, doubtless a man of some capital—considerable more capital than honor—places money in the hands of Rutter, who, for a compensation, engages in this business of loaning it. When Rutter has made a loan to persons in straightened circumstances, and poor, as in this case, having loaned \$275, the plaintiff having paid at the rate of 5 per cent. a month for the use thereof, or 60 per cent. a year, after having paid to Rutter \$141 usurious interest, then,

to avoid a legal tender, on the part of the plaintiffs, if by chance they should be correctly advised as to their legal rights, and in order to avoid the consequences of such a tender for the enforcement of the plaintiff's rights under the law, Rutter shifts this loan ostensibly to LeRoy, so that he may still continue, as he did in this case, to secure from the plaintiffs this unlawful and exorbitant rate of interest until he has secured from them on a loan of \$275 the sum of \$248 interest. For illustration, if, upon the loan of \$100, the parties have paid in interest at the rate of 5 per cent. a month for fifteen months, they would have paid the sum of \$75, leaving some \$26 still due on the original loan with lawful interest. Now, a demand is made for the balance due on the note which at a lawful rate of interest, would be \$26. This note not being paid, the borrower or plaintiff in this action is advised that he must shift his loan and borrow \$100 from somebody else to discharge the claim. Hence the borrower shifts his loan under the advice of the shark, and the result is that the \$100 for which the second note and mortgage is given, is substantially turned over to the first loan to discharge the first obligation, the new mortgage and note securing the second loan, leaving in the pocket of the money lender or money shark \$70 of usurious interest, or about that amount. The person thus procuring the loan thus goes along until he has about paid the claim off a second time; and fearing a tender or the grasp of the law, the money shark again seeks to procure a third note and mortgage, and many times succeeds, no doubt, and so until he has exhausted what little if any means the borrower had at the commencement, and then, as in this case, he has the audacity to go into a court of equity and ask that these plaintiffs be now required to pay, or that the court permit these defendants to take the stove from their kitchen and the bed from beneath them and their children, to satisfy the balance of \$139 they claim still due on a loan of \$275, after having already received in fourteen months \$248 interest.

It is well for the defendants in this case that the matter does not arise in such a manner as to enable this court to administer to them what I think is their just reward in this matter, and I may here add that it is an appalling state of affairs that such institutions of such men as Rutter, LeRoy, and Caleyron are permitted to thus oppress the unfortunate, weak and poor. It has come to the attention of the court in considering this case that some fifteen or twenty institutions or persons are engaged in this business, collecting from the poor of Cleveland some \$15,000 monthly of usurious interest, and in many instances they are backed to the extent of furnishing capital by some of our citizens, and even corporations, who pass as reputable business men and women of the community, with full knowledge how the men they employ in the manner I have indicated carry on this nefarious business. The people engaged in this business many times, as in this case, threaten to take the last vestage of property from the people to whom they have thus loaned, and if the borrowers have sought in any way to protect themselves or their property by transferring it, or are even driven to mortgage it the second time, then they are told they have committed a crime against the law of the state, and unless settlement is had or a peaceable surrender of the lost property is made, they will be persecuted or imprisoned. All such cases ought to be brought to the attention of the grand jury of this county. Every case is a flagrant violation of the blackmailing statutes of this state. It is, in short, an appalling condition of affairs, and it is high time that not only the attention of the grand jury of this county should be di-

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rected to it, but that the legislature of the state should make such provision by law as will afford protection to the unfortunate who are the mere subjects and prey for the disreputable men or corporations engaged in such business.

While I may have gone to some extent out of the way in this case, yet this investigation having revealed the facts that I have indicated, I do not hesitate to say on this occasion that while the courts cannot afford the relief to the extent that these plaintiffs and others should receive, the legislature can, and their attention should be directed to it, and this nefarious business stopped. It is not the case of men of business experience, with money or without money, dealing with one another and securing as they may in a legitimate, proper, and fair manner the best of the deals or a good and substantial living interest or profit; but in the case at bar, it is the sharp, unscrupulous, dishonest, heartless shark on the one hand, backed by the supposed reputable people, but under cover, against the ignorant, the inexperienced, the poor and the unfortunate. This case is one that appeals strongly to the equities of the court upon the facts as they are clearly shown to exist.

Rutter, the defendant, insolvent; LeRoy, a non-resident of the state; Caleyron, in Indiana, makes a proper case for the interference of a court of equity and I do not hesitate to interfere and overrule this motion, and permit the restraining order to remain in force, not only as a matter of equity and protection to these plaintiffs but that all other borrowers from such persons may know that the courts are open to hear their complaints and prevent, so far as we may, such impositions upon them. The motion is overruled.

LIBEL.

[Hamilton Common Pleas Court, December, 1894.]

NOLAN v. KANE.

In order to maintain a suit for libel, where the communication complained of was privileged, such as a communication to the board of education by which plaintiff was employed, it is necessary to show both falsity and express malice. Without proof of falsity and the only evidence of malice a remark that defendant "would get even" with plaintiff, court takes the case from the jury.

WILSON, J.

This case was taken from the jury on the ground that the libel complained of (a communication to the board of education, by which the plaintiff was employed as a teacher), was a privileged communication, and it was therefore necessary that both the falsity of the communication and express malice must be shown. There was no proof of the falsity of the communication, and the only evidence of malice was a remark by the defendant that he "would get even" with the plaintiff.

John W. Herron and Price J. Jones, for plaintiff.

Willis Kemper and — Secrist, contra.

ORDINARY PRUDENCE.

[Lucas Common Pleas, April Term, 1894.]

WARNER V. NATIONAL MALLEABLE CASTINGS CO.**MOTION** to set aside verdict for plaintiff.

An owner or employer is exercising ordinary care and prudence if he directs persons holding themselves out to be carpenters of ordinary skill to erect a building according to certain plans known to the workmen, out of materials upon the ground, having no defects that could not clearly be seen and of dimensions well known to the mechanics.

HARMON, J.

The plaintiff claimed that he was set to work by the defendant upon a frame structure which was insecure and unsafe and dangerous; that while so at work the structure fell and he was injured.

He also claimed that the lumber furnished was of insufficient length to build such a structure as he was directed to build.

The evidence showed that the structure consisted of certain upright posts connected by horizontal beams, laid crosswise, and that plaintiff was set to work to construct a plate lengthwise on top of the uprights. This was to be made of 2 x 4 timber pieces. Fourteen feet in length, to be laid flatwise and spiked together, breaking joints; none of the timber to be cut and the joints to come where they would.

The distance between the uprights was about sixteen feet.

Plaintiff and a fellow workman proceeded with the work, spiking the 2 x 4 pieces together and upon the tops of the uprights. The evidence showed that they were approaching each other from different directions between two of the uprights, spiking together the pieces to form the plate, when, in some way, the pieces they were spiking together parted and they were thrown to the ground and plaintiff was severely injured.

The defendant's foreman, the evidence showed, had directed plaintiff and his fellow workman to perform the work with the lumber, merely saying, "cut nothing; spike the 2 x 4 pieces together flatwise, breaking joints, let them come where they will, and hurry the work." The foreman then went away and left them to do the work in their own way.

Held, that an owner would be exercising ordinary prudence and care if he directed persons holding themselves out to be carpenters of ordinary skill, to erect a building according to certain plans, known to the workmen, out of material upon the ground, having no defects that could not clearly be seen and of dimensions well known to the mechanics using the material.

Held also, in the case at bar, that there was no evidence tending to show that plaintiff was injured by the defendants' negligence.

Motion granted.

A. W. & E. H. Eckert, for plaintiff.

Baker, Smith & Baker, for defendant.

SETTLEMENT OF ESTATE.

[Hamilton Common Pleas.]

*LOUIS DUHME, ADMR., ET AL. V. CHRISTINA MEHNER ET AL.

1. M.—a judgment debtor, induces K. to advance money to buy a judgment lien upon her real estate, which her judgment creditor is pressing for payment. K. examines the title, pays the money and becomes the assignee of the judgment lien, in good faith, without knowledge, actual or constructive, that M's grantors have an interest in the real estate. Held: That K., the assignee, is a quasi purchaser; that he has a better title than his assignor had, and that his equity is superior to that of M's grantors.
2. An heir entitled to a share in the distribution of an ancestor's estate, may have, in proper proceedings, a personal judgment, for the amount of his share, upon the default of the administrator to comply with the court's order of distribution; and if the heir be of age and competent to sue in his own behalf, his right of action will be barred by the statute of limitations, six years from the date of such administrator's default.
3. The usual relations and duties existing between such defaulting administrator and the heir, do not give rise to a continuing and subsisting trust.
4. If by deceit or fraud the heir is induced to agree to surrender any rights against the administrator, such heir must bring his action to set aside such agreement within four years after a discovery of such fraud.

BUCHWALTER, J.

This action was originally instituted by the plaintiffs seeking a recovery of their interests in the real estate and personal estate, as heirs at law, of Louis Mehner, deceased.

So much of the action as pertained to the recovery of the real estate involving an issue to set aside deeds executed by the heirs to their mother, Christina Mehner, on the ground of fraud inducing the execution thereof, was by order of the court separately docketed, and that branch of the case has been heretofore determined by me.

In that branch of the case, the heirs claimed equitable ownership, by reason of fraud on the part of their mother and brother inducing them to convey their interest in their father's real estate to their mother—and claimed that their equity was older and superior to that of Kuhn & Sons.

Kuhn & Sons were assignees of a \$20,000.00 judgment with execution issued on said real estate; that they were bona fide purchasers of the judgment lien, induced to become at the request of Mrs. Mehner, after careful inquiry and examination of title—The judgment creditor, Mr. Schmidlap, at that time was pressing his claim for collection, and all the usual formalities in the conveyance of title to secure the assignees were observed except that of executing a mortgage, and in lieu thereof the judgment was assigned. I have held that these facts raise an exception to the general rule that "an assignee of a judgment lien gets no better title than his assignor," and that the bona fide assignee who buys the judgment lien at the request of the owner of the real estate, becomes a quasi purchaser, and in this case with an equity and title better than that of the heirs. See *Flanders v. O'Brien*, 46 Ind., 284; *Wainright v. Flanders*, 64 Ind., 306; *Tuttle v. Churchman et al.*, 74 Ind., 311; *Hendrickson's Appeal* 24 Pa. St., 363; *Harness Appeal* 94 Pa. St., 489; *Hulet v. Whipple et al.*, 58 Barbour, 224; *Spring v. Short et al.*, 90 N. Y., 543.

*For decision in this case, on motion to dismiss appeal, see 6 Circ. Dec., 78. For decision on demurrer, see 6 Circ. Dec., 253.

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In none of these cases however did the judgment debtor join the judgment creditor, as in the case at bar, in soliciting the purchase for the accommodation of the debtor. (In the consideration of this proposition I have not overlooked *Strang v. Beach et al.*, 11 Ohio St., 283, and cases therein cited.)

The issue now submitted involves that part of the original action wherein the plaintiff seeks to recover their original distributive shares as heirs of the personal property of Louis Mehner, deceased, and to set aside certain receipts given for each respective share of \$21,900.00 each.

On the trial, the sureties, or their heirs, have been given leave to defend in the name of their principal, Christina Mehner, Adm'x. The recovery asked, is against Christina Mehner as administratrix. Although she is also a party individually, no recovery is asked against her, as such, in this action.

The plaintiffs, Duhme, administrator of Florence L. Thompson, deceased, and Albert W. Mehner, respectively ask for a decree cancelling the receipt given by Florence L. Thompson in her life time, and by Albert Mehner, guardian, for the \$21,900, and that the administratrix be decreed to pay to each of said plaintiffs the said sum with interest from August 1, 1877, out of the trust funds which they allege to be yet in the hands of Christina Mehner, Adm'x. This right of recovery is based upon the claim that the administratrix, their mother, and E. L. Mehner, their brother, induced them to believe that it was the wish of their deceased father that the children should convey all their property interests in his estate to their mother; that the daughters in return should receive \$20,000 each; that the sons, E. L. Mehner and Albert Mehner, should have the business and the chattel property in the store as carried on by their father, and that upon the death of their mother the said sons should share all the residue of the property equally.

The co-heir, Josephine Foster, claims that said Christina Mehner, took possession of the property of Louis Mehner deceased, as alleged in the petition, except that she took charge of it with the express condition that she would give to each of the daughters, Florence and Josephine, a home of the value of \$20,000, or that sum in cash, and that E. L. Mehner and Albert Mehner should receive the store and business, when twenty-five years of age, and that the remainder of the estate should remain with the title in the name of the mother, until her death, and then be distributed equally among the four children.

She further claims that it was on the express condition aforesaid, made with her mother, that she parted with all of her interest in the distributive share of the estate, to wit: In the sum of \$21,900.

She relies on her agreement to receive the home, or twenty thousand dollars, and claims certain real property of the value of ten thousand dollars, as a part performance of that express condition and agreement.

But while she asks equitable relief generally, the plea is to be taken in connection with the equity and title which she sets up in the real estate, and there is no plea on record by Josephine Foster, asking to set aside this distributive receipt for \$21,900, and for recovery against her mother, as administratrix in that regard.

The sureties on the bond of Christina Mehner, administratrix, by leave of court have made defense in her name. They admit all matters of record as pleaded by the respective claimants, but deny any fraud inducing the heirs to part with their distributive shares in the estate of their

father, and they claim that it was an agreement between such heirs, and the administratrix, that such receipt should be given and be accepted and approved by the probate court, which they allege was done, as in full settlement and adjustment of the trust as administratrix, and that receipts were accordingly given in November, 1877, which were approved by the court in December, 1877. They claim that such judgment of the probate court, has never been set aside, and remains in full force and effect. They further plead the statute of limitations.

Louis Mehner died January 21, 1876. The widow was appointed administratrix February 8, 1876, and filed her inventory February 13, 1876. The deeds conveying to the mother, the interest of the heirs then of age, in the real estate, were executed very soon after the death of the father. The receipts in final settlement and distribution were given in November, 1877, each for the sum of \$21,900. They were approved with the final account of the administratrix, December, 1877.

Florence L. Thompson, then a married woman, was twenty-two years of age. She died October 4, 1881, leaving an only child, Georgie, one of the plaintiffs in this case, then a minor, and now in her fifteenth year. Louis Duhme was appointed and qualified as the administrator of Florence Thompson's estate.

Josephine Foster, at the time of giving her receipt, was married to John H. Foster, and of age. Albert Mehner was a minor, and continued as such until May 28, 1882. Each of the receipts was executed by the respective heirs, except Albert's, which was signed by his guardian, E. L. Mehner.

Controversy arises as to what in fact took place at the time of the execution of these receipts, and at the first family conference, when the plan of settlement is said to have been made by L. Mehner and his mother, as to the wish of the father.

The petition, it is to be remembered, claims a different agreement than was set out in the cross-petition of Josephine Foster. By that alleged in the petition, the daughters were to receive only \$20,000. By that alleged in the cross-petition of Josephine Foster, they were to receive a home of the value of \$20,000, or that sum in cash, and also to receive their full distributive share in the residue of the estate, after the brothers had received the store and business at the age of twenty-five.

The testimony of Mr. Von Seggern, the attorney, conforms to the averment as set forth in the petition, as he remembers the statement given to him by those in interest at the time of the execution of the papers. E. L. Mehner, in his testimony says, that, the shares were substantially as set forth in the cross-petition of Josephine Foster. The mother's testimony has not been at all satisfactory, upon either this issue or upon any other issue involved in the case. And, yet, I think every one interested in the case, excuses her on the ground of lack of memory and ill health, mental and physical. It is sufficient to say, that after so many years, to wit: Since February, 1877, it is not at all strange that there should be some difference in memory, but it only illustrates the uncertainty which besets the court in undertaking to make a finding that should disturb deeds and receipts given, to be filed in court as evidence of the adjustment of the family affairs and of the estate of their father; and especially so, when the main statement which is said to have been a misrepresentation and a falsehood, and which induced the agreement of the heirs as to this adjustment, comes from E. L. Mehner.

The petition charges that E. L. Mehner originated the scheme to defraud his co-heirs, towit: By enlarging the general statement of the father as to how estates generally so situated, having such members of a family depending on one for bounty, ought to be distributed, into a statement to the co-heirs, that the expressed wish of his father was, that his estate should be distributed substantially as he has testified, and as set out in the cross-petition of Josephine Foster.

To grant the relief which the plaintiffs ask, I would have almost wholly to rely upon the testimony of E. L. Mehner who is charged with conceiving this fraud upon his co-heirs, and who now, as their witness, testifies to his own fraud, to rely on his testimony, when a like family interest now intervenes, in favor of setting aside that which his personal interest is charged with having invented to first set fraud on foot, and to make, as a result, the sureties on her bond, friends of the father or of the mother, bear the loss.

Is the proof in this case, such as to warrant the court in making a finding that there was specific fraud practiced upon the heirs? The lack of certainty in the memory of the different persons in interest however, rather indicates to my mind, that, at least as to these distributive shares given twenty-two months after the death of their father, there was not a reliance upon the misstatement or fraudulent statement, but rather a reliance upon the promise of their mother to answer personally to the heirs in the payment of a certain sum of money to the daughters, or to give them a home, and to give the sons certain property, towit: The store and business, and ultimately distribute as the law would authorize what would be in the name of the mother at her death, to each of the four children equally. I believe, that each of the heirs relied upon that promise, and that statement rather, than that they were led to make these receipts by reason of the fraudulent statement of E. L. Mehner, and that the heirs and their mother entrusted their all to E. L. Mehner, not on the representations of their father's plans or wishes, but on account of their own confidence in his ability to carry on business and manage their finances so as to greatly increase their possessions.

I do not find in the surrounding circumstances or in the testimony, of weight and worth, corroboration of the proof of E. L. Mehner.

If there had been fraud, it is somewhat unreasonable to me that with these direct recollections of what the statement was, as made by E. L. Mehner, and as is purported to have been repeated by the mother to them and repeated by the attorney to them, who is stated to have received the information through E. L. Mehner and the mother, the repeated variations of what the request or wish of the father was, seems to me ought reasonably to have put the heirs upon their inquiry to have ascertained whether the father did make such a specific request or not. The specific and express request or wish which is set out by the one heir is so different from that set out by the others, that any prudent mind would at once have been put on inquiry, whether any such statement was in fact ever made by the father. In other words, the statement purporting to come from the father, is materially contradictory, and one can not sit by until new rights intervene, and innocent persons may thus suffer, and claim, that he or she did not know that the representations were false, if by the ordinary degree of prudence they could have discovered that they were false. Such opportunity is equivalent to knowledge.

There is no averment in the petition that this alleged false and fraudulent representation was not known by the plaintiffs during the four

years preceding the beginning of this action to be false. This action began in July, 1891: An action for fraud must be brought within four years after the fraud is discovered.—That is held in 46 Ohio St., *Douglass v. Corry, Ex'r*. The petition herein seems to have been drawn on the theory that the mere fact that the administratrix had the assets in her hands and had given a receipt for the money which in fact, was not passed to the heirs, was such a breach of duty as that it made the administratrix trustee of a continuing and subsisting trust, but that theory has clearly been demonstrated to be wrong on the authority of the 5th Circuit Court Rep., *Lease v. Martha Downey*, wherein it was held, that an action by the distributees of a decedent's estate to recover an unpaid balance in the hands of the administrator, is barred by the statute of limitations unless commenced within six years and thirty days from the date of the order of distribution made by the probate court. This was an action between daughter and father, where, it was claimed that the father made false statements, and thereby imposed upon her as to the amount due her, and she sued for the additional amount. And likewise, in the recent case of *Webster v. American Bible Society*, 50 Ohio St., was the same holding as to the operation of the statute in such a case. In other words, the statute of limitations begins to run from such time as the heirs are entitled to receive their distributive shares of the estate and are qualified to bring a suit, upon the theory that while said heirs might have some concurrent equitable rights as against the trustee, yet having a right of action at law, they were entitled to recover a judgment and have execution thereon as against such trustee; that the trust terminated at the time when it was the duty of the trustee to have so discharged that trust under the law, and a failure gave the heirs the right to their judgment. 18 Wall., 493, 509. *Clarke v. Boorman's, Ex'rs*.

These cases, together with the 7 Johnson Chancery, 90, and other cases cited in these opinions, certainly very clearly establish that the statute of limitations in such cases, where no fraud intervenes, does operate, and that there is no continuing and subsisting trust.

The defense that the decree of the probate court approving the final report of the administratrix (reciting the payments to the heirs as per their receipts) had not been set aside, and remains in full force and effect, is not well taken, there being no power in the probate court to grant relief, and vacate or modify such judgment.

Johnson, Executor, v. Johnson, 26 Ohio St., 357. "The provisions of section 534 of the code of civil procedure, as extended by sec. 542 to probate courts, do not confer power upon a probate court, in proceedings instituted under sec. 536, to vacate or modify its own orders previously made in the settlement of the accounts of executors and administrators."

In *Lindsay*, 28 Ohio St., 157, it was held that: "Upon closing his final account in the probate court, an amount being due his ward, the guardian induced her to sign receipt for the money as though paid, agreeing to be responsible to her for said amount, with interest. Held: An action may be maintained upon such agreement by the ward, and the sum actually due from the guardian recovered without in any way opening up or reviewing the accounts which had been settled in the probate court."

This was an action between a father and a daughter who had been her guardian, and the opinion of Judge Wright suggested also that such receipts and settlements are a release of the trustees and sureties, although creating individual liability in the person of the trustee.

Judge Wright says:

"To maintain this action, as has been already intimated, it is not necessary at all to interfere with the proceedings of the probate court. Its accounts may remain finally settled and not now be disturbed. Considering the case with all the facts before us as set out in the pleadings and bill of exceptions, we may illustrate the views we take by reference to this voucher, and the settlement with the probate court shows that it was paid, and the settlement is a final one. The finality, perhaps, is such that it would bar the ward from any proceeding against the guardian as guardian or against his sureties. But suppose the money was not paid, as is admitted in this case; suppose the ward consented to such settlement for the purpose of closing up the accounts and releasing the sureties, the guardian agreeing to become responsible in his individual capacity and agreeing to pay the money, can it be said that an action to enforce that agreement is a re-opening of the accounts in the probate court? We think not. The action is based upon the finality of that statement. It is not against the guardian, as such, nor his sureties—it is upon a new and independent contract, the foundation of which is that the accounts are closed, sureties released, and other individual responsibility substituted therefor."

In 31 Ill. Ap., 647. *Butler v. Hall*, it was held that the heir and the administrator might use the estate funds in a private business enterprise of the administrator. The money so used was lost, and the administrator became insolvent. Held: That such secret agreement discharged the sureties upon the administrator's bond, on the familiar principle that a secret agreement between the creditor and principal is prejudicial to the surety, and operates to the discharge of the latter from his contract.

50 Mich., 49. *Probate Judge v. Abbott, et al.* The agreement of the legatee after arriving at age to take the individual note of the executor, and the release receipt in settlement by a minor ratified when she became of age released the executor's sureties, they not being parties to the transaction.

See also 52 Ark., 499. *Court v. Edwards*.

A more troublesome question is raised upon the claim of Albert Mehner, because that he was a minor, and that the receipt was given by his guardian, E. L. Mehner, and yet it has seemed to me that as between the bondsmen of Mrs. Mehner, and the bondsmen of E. L. Mehner, the latter should suffer rather than the former.

It is clear to one who has heard the proof that what deceit, if any, was practiced in this case, was instigated by E. L. Mehner. Secondly, whatever fraud there was rests upon the purpose of E. L. Mehner to obtain possession himself of this estate through his ability to control the mind of his mother. And thirdly, it is shown that the whole estate was in his hands and under his control, and that it was so in sufficient amount at the time when he passed this distributive receipt to his mother. That being so, the trust, which he was charged to administer, rather than the one the mother was charged to administer, should first suffer loss, for he caused her to make breach of her trust duties. That being so, it would seem to me that the receipt which he gave as guardian ought to stand rather than it should not. And, I am not unmindful of the proceeding in the probate court upon exceptions filed to this final account filed in 1889, which should have been filed, (and about which there is no proof as to whether any was filed) prior to the fire. When the minor became of age, in May, 1882, he had an opportunity to know where his money was. It

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seems from the proof that he received information from E. L. Mehner, guardian. It was his right to have the money. It was time in 1882 to demand it. He omitted to demand it until 1891, and now demands it of the administratrix, who had closed her accounts through the receipt of his guardian, November, 1877, making more than fourteen years that the guardian, and more than nine years that Albert (after his majority) had a right of action, before suit was brought.

The statute of limitations, as founded on the delay to bring suit for more than six years after the right accrued to one competent to sue, makes a good defense as pleaded. If the suit were on a written bond, it would seem that the time would be ten years. This action is not on a written bond.

I am fully aware that some things I have said upon the subject of fraud, and as to the discovery of that fraud, may seem to run counter to some recitals in the decree which was handed up to me in the real estate case, but I did not determine those issues of the real estate case, and I simply put my holding in that case on the ground that Kuhn & Sons were quasi purchasers of the title in the real estate, and as such their equity was better than that of the complainants. Any other unnecessary recitals are the contribution of counsel preparing to decree.

The judgment therefore, will be against the plaintiffs and for the defendant, the administratrix.

J. J. Glidden, John R. Von Seggern and E. H. Kleinschmidt, attorneys for plaintiffs.

Follett & Kelly, Wilby & Wald and Francis Lampe, attorneys for defendants.

FRAUD—SALE OF LAND.

[Franklin Common Pleas, January Term, 1896.]

MARY A. SPENCER V. ISAAC F. KING.

1. Fraud in the sale of property defined.
2. The decision of the Supreme Court of Illinois, determining the validity of a title to land situated in that state, is binding upon the court and jury in this case.
3. The opinion as to the value of land expressed by the seller to induce the purchaser to buy is not a fraud, if it was only an opinion, and was honestly given, although untrue.
4. The law does not exact any greater degree of honesty and good faith from a minister of the gospel who sells property than it does from a layman.

CHARGE TO THE JURY

PUGH, J.

Gentlemen of the jury: The plaintiff complains that she has sustained damages by reason of deceit and fraud practiced upon her by defendant. Deceit, or fraud, in business transactions consist in fraudulent representations or contrivances by which one person deceived another who has a right to rely upon such representations, or has no means of detecting such fraud.

It is the law that fraud vitiates every contract. There is no exception to this rule. When fraud is proven to have promoted the making of a contract, it is void, and cannot be enforced.

Fraud taints every transaction which is the result of it.

But fraudulent representations in the sale of property will not, in themselves, always constitute deceit which will be the subject of an action for damages.

In cases like this, where the parties deal with each other on a footing of equality, there must be some existing circumstances, or some means used, calculated to prevent the detection of falsehood or fraud, and impose upon a purchaser of ordinary intelligence, prudence and circumspection. If a purchaser has full opportunity of examining the property, and can easily and readily ascertain its quality and value by inspection, and he neglects to do so, then any injury which he may sustain by such negligence is the result of his own folly, and he can have no relief at law; unless the representation was of such a character as to mislead a prudent person or put him off his guard.

The law wisely and justly presumes, in such a case, that a purchaser will take care of his own interests, and that, when he distrusts himself, his own judgment and shrewdness, he will protect himself from imposition.

When the purchaser has a full opportunity of inspecting the property and fails to do so, and the representation was not such as should have misled him, he has no right to complain, if the property sold does not measure up to the representation of the seller.

It is well known that, in the course of trade, sellers will speak in terms of high commendation of the property which they offer for sale.

Such "dealing talk" is not deemed, in law, as fraudulent, unless accompanied with some artifice calculated to deceive the purchaser and throw him off his guard, or some concealment of intrinsic defects not easily discoverable by reasonable diligence and care.

The plaintiff and her brother exchanged some real estate situated in this city with the defendant for notes owned by him. Part of the real estate consisted of a house and lot, which was wholly owned by the plaintiff, or almost so. I believe the testimony shows that the brother had a small interest in it. The value of the house and lot was somewhere between five thousand and six thousand dollars. The notes aggregated \$7,500.00. A note for \$1,000.00 was also given to the defendant, first by the brother; but afterwards it was signed by the plaintiff.

This transaction was, in law, a sale of the notes by the defendant to the plaintiff.

These notes were secured by a mortgage on three thousand acres of land situated in the state of Illinois.

They have been described by the testimony.

The immediate ground work of the plaintiff's action is the claim and charge that the defendant falsely and fraudulently represented to her and to her agent, her brother, that the notes were well secured on lands which was worth \$15.00 per acre.

It is further charged that the land was not worth that amount; that it was not worth enough to make sufficient security for the notes, and that the title to the land was so involved in dispute as to make the land practically worthless.

It is not controverted that most of the negotiation which led to these sales and exchange of property were chiefly conducted, on the part of the

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plaintiff, by her brother as her agent. She only claims that she had one conversation with the defendant.

In law all that her agent, LeRoy Spencer, did and said in the course of his agency, while he was acting as her agent, and within the scope of this agency, is just as binding upon her as if she had been the authoress of those acts and declarations.

Any notice and knowledge which he possessed, was her notice and knowledge; any imprudence or mistake or neglect which he committed, was, in the eye of the law, her imprudence, mistake and negligence.

You have observed from my statement that the defendant is charged with having made two false representations. First, that the notes were well secured by a mortgage on land; second, that the land was worth \$15.00 per acre.

Putting aside for the present, any rule of law that is specially applicable to those complaints, or either of them, you are instructed, that to entitle the plaintiff to recover, she must, by a preponderance of the evidence, have proved: 1. That the representations, or one of them, were made. 2. That both or one of them, were false. 3. That the defendant knew, at the time they were made, that they were false. 4. That she and her agent were then ignorant of their falsity. 5. That she relied upon those representations, or one of them, in making the purchase of the notes and in selling her property. 6. That she was justified in relying upon them, and—7. That she was pecuniarily injured by her conduct which was induced by those representations, or one of them.

If all of these propositions of fact have not been proved by a preponderance of the evidence, the defendant is entitled to your verdict.

If the defendant made the representation that the notes were well secured on land, that meant that the land would sell for enough to pay the notes, if the mortgage should have to be foreclosed.

That was what the plaintiff was entitled to, if such a representation was made by the defendant.

It is claimed that the notes were not well secured, because the title to the land was not good.

It was conveyed by a mortgage and trust deed to one Seymour, which were executed to secure certain bonds, called railroad bonds.

The mortgage was foreclosed by a decree of the circuit court of the United States for the southern district of Illinois: the land was sold, under that decree, and purchased by the bondholders.

The evidence does not disclose that the apparent title of those purchasers has ever been annulled by any court.

After that suit for foreclosure was brought, Wayne county sold the land to the Illinois South Eastern R. R. Co.

It was this title which was held by G. D. Martin when he executed the mortgage that secured these notes to the plaintiff.

But the Supreme Court of Illinois has decided that the decree of foreclosure of the United States court was a nullity as to those who purchased the land of Wayne county and who were not parties to the foreclosure suit, although they purchased after the suit was brought, and even after the foreclosure.

That court also decided that Wayne county was not legally authorized to mortgage the land to Seymour, because the condition upon which the county might aid in the construction of the railroad for whose benefit the mortgage and trust deed were executed did not then exist; and therefore they were void.

This decision was introduced in evidence. It discloses what the law of Illinois was, and is, and it demonstrates as matter of law, that there is no merit in the title which is claimed to be adverse to the title which was conveyed to the defendant by the mortgage to secure the notes sold to the plaintiff. By this decision both the court and the jury in this case must be controlled.

Still the question is, were the notes well secured by the mortgage on the land?

It is claimed that, in spite of the fact that the law of Illinois makes the King title paramount to the other opposing title, there was and is a cloud on it which destroys the sufficiency of the mortgage as a security for the notes.

If the adverse claim based upon the foreclosure which was caused by the United States Court decree, injuriously affected the title covered by the mortgage to the defendant; if it could be vexatiously used against that title, it constituted a cloud upon that title. A title of which a purchaser cannot acquire possession, except by litigation and judicial decision, or one which he must defend, or which would expose him to litigation, is a doubtful, and unmarketable title.

If the evidence shows that the title which was conveyed by the mortgage in question was such a title as I have described, then it is competent for you to consider it, in determining whether the mortgage security for the notes in question was destroyed or impaired; if it does not show that fact, there is no merit in the claim touching the disputed title.

LeRoy Spencer, in his deposition, testified that the defendant told him "at the time of the trading that there was a pretended claim to the land by other parties, but that they could not sustain the claim, for the reason that they had held the land in the family for over 30 years, had paid the taxes, and no other claim had been set up against it coming to him;" and that he also told him "how the other claim had come; that the government had given the land to the state, and the state had given it to the county, and the counties had given the land to some railroad companies on a contract, but the contract had never been fulfilled, and the title failed on that account. Then the county contracted with another railroad company, and Mr. King got his title, or his father-in-law got his title from the last company."

This evidence must have the same influence upon your minds in determining this question, as if the evidence proved that the communication had been made by the defendant to the plaintiff, and was admitted by her; because he was her agent.

I submit the question to you, whether this admission of Spencer's does not show that he had the means of knowing all of the truth about the title to the lands. The law requires persons "in their dealings with each other, to exercise proper vigilance, and apply their attention to those particulars which may be supposed to be within reach of their observation and judgment, and not to close their eyes to means of information which are accessible to them."

If Spencer had full knowledge of the condition of the title to the land, before the exchange was made, or if it was within his reach owing to the information given to him by the defendant, that was the same as if the plaintiff possessed it, and if you so conclude, you will not be authorized to return a verdict for the plaintiff, so far as her cause is founded upon the first alleged misrepresentation, namely, that the notes were well secured by a mortgage on the land.

Now as to the other alleged misrepresentation, that the land was worth \$15.00 per acre.

The plaintiff, as well as LeRoy Spencer, testified in regard to this matter.

The opinion which a seller of property expresses concerning its amount, value and quality is frequently asked for, and given at sales, and is never a ground for a law suit, when it proves to be untrue, if it was only an opinion, and was honestly given.

But if the statement of the value was more than an opinion; if it was an affirmation of a specific material fact; if it was deliberately made by the seller who had superior knowledge in regard to it, and if it was acted upon by the buyer; and if it was known to the seller to be false, it may be deemed fraudulent and a sufficient basis for an action.

This is the rule which applies to this branch of the case here.

The defendant was about to sell, not land, but a mortgage on it, or rather notes secured by it; the land being situated in another state, not accessible to the observation and judgment of either plaintiff or agent. If the defendant had knowledge of its value superior to their knowledge, or superior knowledge without regard to theirs; if he deliberately represented to both, or one of them, that it was worth \$15.00 per acre, and that was something more than the general praise or puffing, which sellers are liable to indulge in; if he knew it was false; and, if the plaintiff, or her agent, acted in reliance upon it, in making the purchase of the notes and in selling her property, it is competent for you to infer that it was a fraudulent representation, unless you further conclude that it was not material. What I mean by this is, that if the evidence discloses that the land, although not worth \$15.00 per acre, was worth enough to pay the notes, then, the plaintiff cannot complain. She is not entitled to recover damages on this ground.

But, if you find that the representations as to the value of the land, or as to the notes being well secured, were only opinions, only trade talk, then the plaintiff cannot recover any damages, notwithstanding the opinions were untrue.

The law does not assist the purchaser who pins his or her faith to the exaggerations of the value of property made by the sellers of it.

And you should reach the same conclusion, if you are convinced by the evidence that the defendant believed the representations to be true and he had good reasons for so believing although in fact they were not true.

This is not a case where a fiduciary relation existed, and where confidence, expressed or implied, growing out of or connected with the transaction in question, was reposed by the plaintiff in the defendant. The evidence does not prove such a case. The only relation between them was that of vendor and vendee, the parties dealing with each other at arm's length.

In determining the questions submitted to you, you will consider not only what was said and done by the plaintiff, her agent, the defendant and his agents Rickard and Gaskill, but also the fact that the notes were endorsed without recourse by him, and the fact that some of the deeds in the chain of both titles, were quit claims, and not general warranty deeds, as far as they bear upon these questions, and all the other facts and circumstances proved, bearing upon the questions.

The endorsements of the notes without recourse released the defendant from all personal liability upon the notes, but that was all.

If the notes are invalid from want of consideration as a result of the fraud charged in this case; and if this fraud has been proved, his qualified endorsement of the notes does not shield him from a recovery for damages on this ground.

The evidence of the defendant tends to show that LeRoy Spencer, as the agent of the plaintiff, after the sale of the notes, visited the land, and made some inspection of it, and on his return expressed his own and his sister's satisfaction with the land.

There is evidence on the plaintiff's side however, which tends to controvert that evidence. That evidence (the evidence for defendant) was only admitted as tending to prove an admission by the plaintiff's agent, that she was not defrauded as she claimed, in this action, and for no other purpose.

It cannot be considered as foreclosing her right to maintain this action; for the evidence does not prove that the defendant relied upon the alleged admission of Spencer as the inspiration for any action of his own.

I admonish you that there is no issue here about the want of business capacity or mental weakness of either the plaintiff or her agent.

There was some evidence cropped out on these subjects, but not being made part of the cause of action, they cannot be ground for recovery.

Should you reach the conclusion that the plaintiff is entitled to recover, the measure of her damages would be the face value of the notes, and interest to date added, less the value of the 1500 acres of land which was conveyed to her by Martin, and less the thousand dollar note and the interest unpaid.

In estimating the value of that land, you have a right to consider the fact, if it has been proved, that the defendant has an attachment lien on it to secure the payment of the one thousand dollar unpaid note.

In considering and deciding this case, you must not permit the mere facts that the plaintiff is a woman, and the defendant is a minister of the Gospel to influence your judgment.

These are circumstances that may have some bearing, but they are not substitutes for evidence that may be wanting to prove material facts, if you find that is the posture of the evidence.

The law does not exact any more from a minister of the Gospel than it does from a layman, when he makes a sale. You may have a conviction that a minister, in such a transaction, should act upon higher principles than a layman, but the law does not demand it, and therefore you have no right to do it.

This may be a melancholy fact, but it is not within the province of the court or jury to alter the law.

The performance of the moral duties of charity, gratitude, generosity, magnanimity, courtesy, mercy and kindness is not enforced against either a minister or a layman. Natural justice enjoins their performance, but the law refuses to do it, for obvious reasons.

It is your duty to do what is legally just by both plaintiff and defendant.

The law and evidence must guide you in doing that, nothing else. Here you must know neither friends nor enemies. Here you must be actuated by reason only, in its most cool, calculating, deliberate and unsympathetic spirit.

Invoke in you the spirit so beautifully, though figuratively, exemplified in the Goddess of Justice, who, blind-folded, weighs in the scale of justice every human action, and fearlessly determines the right without passion or prejudice, and uninfluenced by the wealth, position, or the rank of the parties.

BUILDING EXCAVATIONS.

[Hamilton Common Pleas.]

ELSHOFF V. DEREMO.

Where building lots extend from a higher to a lower street, the depth to which the owner may excavate his lot under the statute, without being liable for damage to his neighbor, if free from negligence, is determined by a slanting line from the curb of the higher to the curb of the lower street.

CHARGE OF THE COURT TO THE JURY,**BATES, J.**

Gentlemen of the jury: Your consideration of this case will have to be divided into two parts, viz: The injury to the soil and the injury to the house.

First, as to the soil: There has been a caving in of the soil between the plaintiff's two houses, and along the east side of his lower house. Every man has a right to have his soil left in its natural state, and his neighbor has no right to take away the support from it that nature gave. If the plaintiff's soil would not have fallen in but for the weight or pressure of his buildings, or but for his having piled earth on it, or terraced it, he cannot recover for the disturbance. But if the caving in of his soil was caused by defendant's excavation, and would have happened even if no buildings or terracing or other artificial weight had been put upon it, he can recover what it would have cost at the time of the caving to restore the soil to its natural state, that is, to put back the soil as it originally was, but making no allowance for additional earth used in any terracing or otherwise, and no allowance for paving. And this cost bears interest to the first day of the term, i. e., to April 1st.

Second—As to the building: The state of Ohio has a law making people liable under certain circumstances, if by digging they injure such adjoining improvements as consist in house or walls. This will not include terraces or brick pavements.

This statute allows a person to dig a certain depth without being liable for injury to adjoining improvements, provided he was not careless in his digging. This statutory depth was nine feet in 1883, when the injured house was built, and was changed by law to twelve feet in 1888, before defendant's excavation was made. That law said that a person could excavate to that depth without liability, but if he dug deeper, he must pay for injury to the improvements. And it says that the depth must be measured at that distance below the curb, or if there be no curb, then at that distance below the surface of the adjoining lots.

In our case, we have two streets, and both parties' properties run side by side through from one to the other street. Both front on Brown street, which has and had an established grade and a curb, and they run with approximate uniformity of ascent, up the hill, about 130 feet, to Bellevue street, which is over 30 feet higher than Brown street. In 1883, Bellevue street was open, but its grade had not been established as far west as these properties, nor had it a curb. Its present grade is some five feet higher than its natural surface.

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Now this statute, in effect, creates both a protection and a liability. It gives a protection to a man whose foundations reach the statutory depth, and creates a liability upon one who digs deeper. But when a lot has two curbs, or two fronts of different grade, the statute does not say by which one to go.

I see no way to give the benefit of both fronts except to say that the statutory depth means that depth below the line from curb to curb, a slanting line, nine or twelve feet below what the surface of the ground, if reduced to a strictly uniform slope, would be at each point. Now taking this line as being intended by the statute, the plaintiff if his rear foundation was nine feet down below said surface line, will have the protection of the statute, and defendant would have to pay for all the injury he caused to the house; but if his rear wall does not go to that depth, although his front one does, then he has not brought himself within the protection of the statute as it was in 1883; and the only remaining question then would be as to the liability under the statute as it was when the defendant excavated.

By that statute, defendant could dig twelve feet without liability for buildings, and if he dug over twelve feet, he was liable for the buildings.

Now, as Brown street had a grade at the time he began to excavate, the line of liability is a sloping line twelve feet under ground, below a straight line from the Brown street curb to the Bellevue street curb. For all the mischief that happened while he was not lower than that line he is not liable. That is to say, his digging is to be divided into two periods. First, while he is above that twelve foot sloping line, and second, while below it. While above it, that is, before he had got down to a point below that line, he was not bound to shore up plaintiff's house. He was bound to dig carefully, but the employment of a reasonable, careful contractor, is a sufficient exercise of care here, and if the house was injured during the time, he was not liable for it; for otherwise, the plaintiff would deprive the defendant of all benefit of his own lot; and, up to that point, plaintiff must hold up his house himself. But after plaintiff had reached the twelve foot line, any damage caused by his exceeding that line—whether he dug himself, or had a contractor, and whether careful or not, all damage to buildings caused by exceeding that line he must pay for.

Now what were those damages? It is only to a building; terrace, brick pavings and shrubbery must be excluded, and no rental value has been proved. The damages must be the cost of putting the house back to the condition it would have been in had the twelve foot line been observed.

Now, all the evidence as to the whole hillside having a tendency to slide, and being affected by springs, is valuable as tending to show how much of the injury might have occurred while the digging was lawful, that is, while above the twelve foot line; but beyond that, it is of no value; because at the point where it became the defendant's duty to hold up the house, the fact that it would slip easily, had nothing to do with the case, if it would not have slipped but for the unlawful digging. To sum up, the items to be ascertained are:

1. The damage to the natural soil, regardless of the depth of excavation, or whether it was done carefully or not.
2. The damage to the house to the extent that it would not have happened if defendant had not gone beyond the statutory depth.

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These items are to be ascertained under the rules laid down in the foregoing charge. Interest is to be allowed up to April 1st, and the whole returned as a lump sum in your verdict, if you find for the plaintiff. But if you find for the defendant, your verdict will simply be for the defendant.

Bode & Spiegel, for plaintiff.

E. B. & James Molony, for defendant.

PURE FOOD LAW—AFFIDAVIT.

[Lucas Common Pleas]

GLEN K. EMERY V. STATE OF OHIO.

The affidavit should contain such a statement of the nature and cause of the accusation as would impart to the accused, reasonable information of the charge so as to enable him to prepare his defense.

An affidavit substantially in the words of the statute upon which the prosecution is based, is sufficient where the statute itself sets forth and defines the offense.

The statute providing against the sale, etc., of adulterated food, drugs, etc., having been passed in 1890, which makes the United States Pharmacopoeia the standard as to the genuineness of drugs, it is error for the court in a prosecution under this statute, to admit as conclusive a United States Pharmacopoeia published in 1894, without showing that the test prescribed in the later edition is the same as was prescribed in the edition when statute was passed.

PRATT, J.

The plaintiff brings his petition in error for the purpose of reversing a judgment rendered against him, by Peter M. Gress, a justice of the peace, upon a verdict of a jury in the case of the State of Ohio v. Glen K. Emery. Prosecution against him was brought under what is known as the "Act to Provide against the Adulteration of Food and Drugs." The affidavit was filed on the seventh of February, 1896, and charges that the defendant "did unlawfully offer, expose for sale and did unlawfully sell to the said George Holmes, Jr., a quantity, to wit: A package, of a certain drug as, for and under and by the name of cochineal; that then and there said so-called and so-represented cochineal was adulterated in this, to wit, that being offered and exposed for sale, under and by a name recognized in the United States Pharmacopoeia, it then and there differed in the standard or strength, quality and purity laid down in said United States Pharmacopoeia for cochineal."

Plaintiff in error having been arrested under said affidavit, filed before said justice, a motion to quash said affidavit and discharge the defendant; which motion having been overruled, exception was taken. Thereupon he filed his demurrer, upon the ground that the fact stated in said affidavit did not constitute an offense against the laws of the State of Ohio; and the demurrer being overruled, he again excepted.

A trial was thereupon had before a jury; a verdict was rendered against the accused, and motion for a new trial was filed by him, also in arrest of judgment. These being overruled a fine of fifty dollars and costs was adjudged against him, to which he in due time excepted, and filed a bill of exceptions embodying all of the evidence submitted in the case.

A petition in error was thereupon in due form filed in this court, setting forth a large number of errors, there having been during the trial a great number of exceptions taken in the case.

In the argument before this court, the errors as discussed may be classified as follows:

1. The overruling of the motion to quash, and the demurrer.
2. Errors in the admission of evidence.
3. Errors in the charge of the court.

The statute under which this prosecution was brought, was originally passed, March 20, 1884, on the same day that the general statute in relation to the authorization and registering of pharmacists was passed. The latter law was embodied in the Revised Statutes of 1890, in sections 4405 and following. The statute here in question—and being section 3 of the original act—having been passed as amended, April 22, 1890. Sections 1 and 2, of the original act, were not amended in 1890, but stand in the revision as they were originally passed in 1884. These provided, in substance, and so far as relates to this case, that it shall be unlawful for any person in the state of Ohio to sell or offer for sale any drug adulterated within the meaning of the act, that the term drug shall include all medicines for internal or external use, etc.; and by section 3, (8807), as amended in 1890, "An article shall be deemed to have been adulterated within the meaning of this act: (a) In the case of drugs (1) If when sold under or by a name recognized in the United States Pharmacopoeia, it differs from the standard of strength, quality or purity laid down therein."

The affidavit in this case—as will be seen from the quotation already made—embodies this last quotation from the statute, and makes the violation of this provision the essence of the charge.

The first question in order for discussion here is:

1. As to the sufficiency of this affidavit.

Objection was taken both to the form and substance of the affidavit upon the motion to quash and the demurrer, and extended argument has been made before me as to both objections.

So far as the objections to the mere form are concerned, they do not seem to me to be material; and so far as the substance is concerned, the position taken by counsel for the State, that it is only necessary that the affidavit should contain such a statement of the nature and cause of accusation as would impart to the accused, reasonable information of the charge made, so as to enable him to prepare for his defense, is substantially correct. The affidavit in this case is made substantially in the words of the clause of the statute upon which the prosecution is based; and while the affidavit might well have been more full in other respects, yet if the statute itself does set forth and define an offense, it seems to me that the affidavit is sufficient; in other words, it is as good as the statute.

The question that has given me the most trouble in this case is, whether this statute, under proper rules of construction, does sufficiently define the offense for which the prosecution is brought? For the purpose of getting light from the elementary works, I have examined quite fully the well known works of Bishop on Statutory Crimes, and Endlich on Construction of Statutes, both of which very fully discuss the question of penal statutes with citations of a multitude of decisions of courts.

There would seem to be no chance for difference of opinion upon the question that penal statutes have largely been modified since the days when extreme penalties were inflicted for trivial offenses; but the rule still

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holds good that in penal statutes it is not sufficient that the offense be within the mischief, but it must be within the words of the statute; the transaction must be covered not only by the spirit, but by the letter of the statute, and the statute cannot be extended by the courts by construction so as to include an offense not within both the spirit and the letter of the statute. To quote from the opinion of the court, in a case found in 50 Pa. St., page 207, speaking of the rule of strict construction: "The purpose of the rule is to prevent acts from being brought within the scope of punishment because courts may suppose they fall within the spirit of the law, though not within its terms. To create offenses by mere construction, is not only to entrap the unwary, but to injure the rights of citizens." All citizens are bound to take notice of the general statutes of their state, and cannot plead ignorance of these statutes in excuse. It is also competent for the legislature to provide that private or local acts may be considered as general in their application, and parties and citizens be required to take notice of them; but it is very questionable, whether it is competent for the legislature to provide that the citizen shall be required at his peril to take notice of rules or regulations of any persons or body of persons outside of the state or not amenable to the state.

During the argument of the case, I inquired of counsel whether they could point me to any statute, in this or any other state, which had undertaken to define an offense in any other way than by the statute itself. Both of the counsel conceded that they had not been able to find any such statute, with the suggestion that it might be competent for the legislature of Ohio, to provide that the offense of larceny might be such as it was defined to be by the statutes of another state, but no citation was made of any such statute, and it seems to me to be very questionable whether any such provision could be sustained.

This case, however, may be distinguished from that in which the provision is sought to be made in reference to an offense involving moral turpitude, or which was indictable at common law. And upon this point counsel for the State rely upon the decision of our Supreme Court, *State of Ohio v. Dennis Kelly*, 54 O. S., 166. The prosecution in that case was brought under this same statute, but under the provision of it in reference to the sale of adulterated food. The exact point involved was, whether ignorance of the accused of the adulteration of the article would avail him as a defense? The court's opinion—by Shauck, justice, is based upon a distinction between this statute and those involving the punishment of acts involving moral turpitude. Instead of being an act of the latter kind, it is said that the purpose of this act is to protect the public against the hurtful consequences of the sales of adulterated articles. Not to quote here at length, the concluding paragraph of this opinion is as follows:

"In the enactment of this statute, it was the evident purpose of the general assembly to protect the public against the harmful consequences of the sales of adulterated food and drugs, and, to the end that its purpose might not be defeated, to require the seller at his peril to know that this article which he offers for sale, is not adulterated, or to demand of those from whom he purchases, indemnity against the penalties that may be imposed upon him, because of their concealment of the adulteration of the articles."

Upon full and careful consideration, I have come to the conclusion that the principle announced by the court in that case is applicable to the

question here; and that in accordance with this principle, the accused in this case was required at his peril to know that the drug offered for sale was within the rule laid down in the Pharmacopoeia; and if so, the statute is sufficient to maintain the prosecution, and the offense is sufficiently charged in the affidavit; and it is upon the authority of this decision that I so hold.

2. Objections to evidence.

Numerous objections were made upon questions involved in the introduction of evidence, both as to the admission and the exclusion of parts of that offered. A few of these exceptions have been relied upon in argument; and as to those which have been relied upon, there is only one which I consider material, and that is as to the admission of the Pharmacopoeia in evidence.

Some of the evidence, especially that in relation to the exposure of this drug in his place upon the shelves of the accused, I consider immaterial; and if a further trial should be had in this case, that offered both on the part of the prosecution and the defense, had better be omitted, for the reason that it tends to confuse the jury by diverting their minds from the material to the immaterial issues of the case. But I do not think the errors in this respect would be what is so frequently termed by the courts of review as "reversible errors."

The question, however, which it is important to consider, is, as to the introduction of the Pharmacopoeia. The edition of the Pharmacopoeia offered in evidence is labelled upon its back with the year "1890;" but upon its title page it is said to be "Official from January 1, 1894." The provision in reference to the drug here in question—cochineal—is as follows: "When completely incinerated, cochineal should leave not more than five per cent. of ash."

This prosecution is under a statute passed in 1890, and this edition of the Pharmacopoeia, provides a test made in 1894, and no evidence was introduced to show whether the test at the time of the passage of the statute was the same as that named in the copy introduced in evidence. It is claimed on the part of the plaintiff in error, that if the legislature saw fit to adopt as a standard the United States Pharmacopoeia, that it must of necessity be considered as adopting the Pharmacopoeia, then in existence, and that it cannot be supposed that the legislature intended to create as a lawful standard, defining an offense, a book not then published, and which had not been even compiled or prepared for publication. The legislature itself could not know what such a book would contain. It is claimed by counsel for the state, that the United States Pharmacopoeia, is a recognized scientific publication; that the compilation is made by an association of physicians which has been in existence in the United States since the year 1817, and which published the book, which is revised every ten years. The book itself offered in evidence shows this statement as the nature of the book to be correct; and it is claimed by counsel in argument that it was competent for the legislature to adopt it as a well known book of science; and it was also claimed that the presumption is that the provisions of the edition of 1890, which was offered, were the same as those of the previous publications. It seems to me, however, that this contention on the part of the state cannot be sustained, but that the rule as claimed by counsel for plaintiff in error is the correct one. This book was not one that was a completed work; but the very object and purpose of the association was to make a revision from time to time for the purpose of correcting or improving upon classifications as made at former

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meetings of the association and in former editions. It will be conceded that the presumption might go forward; but it does not follow that it would go backward. It is like a statute of the state; when we find a statute in existence at a certain time, it is presumed that such a statute remains in force until it is repealed or amended; but the existence of a statute in one year does not presuppose that the statutes were the same in former years. It even presupposes the contrary, as I would think, and so here, it seems to me that the construction must necessarily be that the legislature in the year 1890, in providing a test to be made from any book or outside source, must be held to have contemplated one that was then in existence, and of the provisions of which they may be presumed to have had knowledge; otherwise I can see no grounds whatever upon which the statute could be supported.

My conclusion, then, upon this point, is, that the admission of the edition of the Pharmacopoeia in 1894, in evidence, was an error, and one vital in the case, and which must cause the reversal of this judgment against the plaintiff in error.

3. The charge of the court.

The Pharmacopoeia having been improperly received in evidence, the charge of the court, that its evidence was conclusive, was erroneous for that reason.

If the Pharmacopoeia which was in existence at the time of the passage of the statute, had been the one in evidence, then the charge would, in that respect, have been correct.

There are some criticisms by counsel made upon the charge in other respects, but these do not seem to be material.

The reversal is based wholly upon the ground of the admission of the Pharmacopoeia, compiled and published after the passage of the act, and for that reason the judgment is reversed, and the cause remanded to the justice.

BLACKLISTING RAILROAD EMPLOYEE.

[Lucas Common Pleas.]

*WILLIAM MATTISON V. L. S. & M. S. R. R. Co.

1. Where there is no contract between a railroad company and one of its employees binding either for a specified length of time, the employment may be terminated by either at any time with or without cause; but while a railroad company has a right to discharge such employee, it has no right to interfere with or prevent such employee from obtaining employment elsewhere; and where such railroad company, by its agents or officers, by their action in enforcing the rules of the railway company, renders it impossible for such employee to obtain other employment in his chosen vocation as a railroad man, the railroad company will be liable in damages to such employee.
2. Malice may be express or implied, and will be implied where there is an unlawful purpose and intent to cause damage or loss to another.
3. It is not necessary in such case to prove a combination between railroad companies through their officers in the enforcement of their rules; if the railroad company acted intentionally, wilfully and maliciously, and thereby caused damage to the discharged employee; he is entitled to recover damages.

* For opinion on demurrer, see 3 Ohio S. & S. P. Dec., 526.

CHANGE OF THE COURT.

PRATT, J.

Gentlemen of the Jury: On the nineteenth day of May, 1894, William Mattison, the plaintiff in this case, commenced his action in this court against the Lake Shore and Michigan Southern Railway Company, and thereafter filed herein his amended petition, to which the defendant the railway company, has filed its answer; and upon the issues made by this amended petition, and this answer, this case has been upon trial and is now submitted to your determination under the instructions which the court will give you as to the law.

The plaintiff alleges for his cause of action against the defendant—after setting forth the incorporation of the defendant company—that he, the plaintiff, had been in the employ of said company from the year 1879 down to the ninth of April, 1892; that he is a man of sober and industrious habits; that he has served said company in the capacity of a brakeman until the year 1885, and after that as conductor, performing all his duties faithfully and well, and becoming proficient in the knowledge of his duties in the capacities in which he was employed. That he had never done any other work—knew nothing of any other kind of work—that he was, in March, 1892, earning and his labor was worth \$120 per month. That because of his standing and knowledge of his work and his experience he was appointed by his fellow workmen to represent them in several conferences with managing officers of the defendant company and his superiors. That, as such representative, he objected to certain rules adopted by the defendant company and by all other trunk line railroads in the United States, to take effect November 15, 1890, and numbered 625 and 626, and commonly known as “black list rules,” which read as follows:

“625. No person suspended or dismissed from one department or division of the service shall be employed in another without the consent of the head of the department or division from which he was dismissed, subject to the approval of the superintendent, and assistant superintendent, or general superintendent.

“626. No person from any other railroad shall be given employment in the service of the company, unless satisfactory evidence is produced as to previous record, character and ability.”

He then alleges that shortly after this meeting this defendant company, by its officers and managers, conspiring and intending to injure plaintiff, and with malice, unlawfully, wrongfully and maliciously discharged plaintiff from its services and employment, without cause or provocation. And he further alleges: “That thereupon the defendant, conspiring and confederating together with a great many other railroad companies, all acting in concert, to defraud and injure plaintiff and deprive him of the income and benefit of his knowledge and skill as a railroad man, and to further injure plaintiff and prevent him from securing employment in his chosen vocation, trade and calling, maliciously, wrongfully, and unlawfully caused the said ‘black list’ rules to be enforced as against this plaintiff, thus preventing him from securing employment from any other railroad company.”

“That by reason of the premises and the wrongful, malicious and unlawful acts of the defendant company, plaintiff was and is prevented from securing employment in his chosen avocation in which he had, so

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as aforesaid, become proficient and skillful, and in the pursuit of which he was able to, and did, make and earn good wages, to-wit : \$120.00 per month and he charges and alleges the fact to be that the defendant company wrongfully, unlawfully and maliciously enforced said 'black list' rules numbered 625 and 626 against plaintiff, and demanded and procured the enforcement of said rules against him by other railroads, to his great damage."

"Plaintiff further alleges that, being thus shut out from his chosen avocation, he was compelled to seek work elsewhere."

And by way of making a claim for damages, he alleges that he was earning and receiving as conductor \$1,440.00 per year ; that he could only find work as a policeman, and that as such, he could earn only \$720, for the first year, and \$800 per year after that ; and that he is now thirty-two years of age. And he further alleges that the defendant company, thereafter, seeking further to injure plaintiff, wrote letters to the chief of police of Toledo, Ohio—under whom he was employed—and demanded that he be discharged and removed from the police force of the city, and that defendant is still trying to procure such removal ; and by reason of the premises, he asks judgment against the defendant in the sum of \$50,000.

To this amended petition the defendant files its answer and admits the incorporation of the defendant ; that the defendant worked for the company, as stated by him ; that he is now in the service of the city of Toledo as policeman ; that rules numbered 625 and 626 are two of the rules of defendant company, averring that they were proper and adopted in good faith as in its judgment it was competent for them to do in the management of their business ; and the answer denies each and every other allegation of the amended petition.

The burden of proof is upon the plaintiff to sustain, by a preponderance of the evidence, such part of the issues thus made as are necessary for him to recover, and as to this I will now give you the rules of law by which you are to be governed.

The defendant company in the conduct of its business, had the right to make reasonable rules and regulations for the government of its employees in the conduct of that business, and the defendant company had the right to select officers and employees to whom it would entrust the carrying on of the different branches of its business. It is not alleged or charged in this case that this plaintiff was engaged or employed under any contract by which either the company was bound or required to retain him in its service for any definite period of time, nor that the plaintiff was bound or required to remain in its service for any certain length of time ; and so far, therefore, as the regulations between plaintiff and defendant were concerned, his employment might be terminated at any time, with or without cause, and simply at the wish or will of either party ; and it would make no difference, therefore, either as to the discharge by the company or as to the plaintiff leaving the employment of the company, what the motive was for the action of either. The defendant company, however, while it thus had the right to end plaintiff's employment by the defendant company, was not authorized to interfere with or prevent the plaintiff from obtaining employment elsewhere, and the question for you to determine from the evidence before you in this case is: Whether the defendant company, through its officers or agents, representing the company in the hiring or control of the plaintiff, or of a class of employees of which he was one, did, by their action in enforce-

ing the rules of the company, render it impossible for the plaintiff, as he charges in his petition, to obtain other employment in his chosen vocation as a railroad man.

In order to find the defendant liable to the plaintiff in this case, it will be necessary for you to find that the alleged act or acts of the defendant company, through its officers, charged with the enforcement of the rules in question, was done: (1), intentionally and wilfully; (2), that they were calculated to cause damage to the plaintiff in his said business or vocation; (3), that they were done maliciously; (4), that actual damage and loss resulted therefrom to the plaintiff.

It is important for me here and in this connection, to define the term "maliciously," as I now use it, and as it is to be applied by you in this case. Malice, or malicious acts may be either express or implied, in law. By express malice I mean ill-will or enmity of one person to another. Malice is implied, however, in law, where there is an unlawful purpose and intent to cause damage or loss to another, without right or justifiable cause. In order to find the necessary ingredient of malice in this case to entitle the plaintiff to recover, it is not necessary that you should find this personal ill-will; although if you do find that such hatred or ill-will existed in the mind of the officer of the company committing the act, and who was superior to the plaintiff and under whose control he then was, that would be sufficient; but, if failing to find that, you still find that the act of the defendant company, through such officer or officers, was unjustifiable and done with the intention to injure the plaintiff, then such act would be done maliciously. Unless you find under these rules all the requisites to a recovery by the plaintiff, established by a preponderance of the evidence—not by evidence beyond a reasonable doubt, as in a criminal case, but by a preponderance of the evidence only—then your verdict must be for the defendant.

If, however, you find that the defendant company here, through its officers and agents superior to the plaintiff, and charged with the enforcement of these rules and those which I have been requested by defendant's counsel to give, which I will give further on, intentionally and wilfully and maliciously prevented the plaintiff from obtaining employment by other railroads in like business, and plaintiff thereby sustained damages, plaintiff would then be entitled to a verdict in his favor at your hands. And, in this connection, you are also to consider the question whether the defendant company combined or confederated with other railroad companies—as charged in the petition—for the purpose and with the intention of enabling one railway company to prevent employees which it had discharged from its service from obtaining employment with such other companies. If you find that the defendant company adopted the rules which are here in question, not for the purpose only of enabling it to conduct its own business, but with the intention and for the purpose of preventing the employees it had discharged from obtaining such other employment, and that their enforcement would have that effect, then the adoption of such rules, for that purpose, would be unjustifiable, and the enforcement of rules, adopted for such unlawful purpose, would be unjustifiable; and, therefore, under the definition which I have already given you, would in law be malicious.

It is not necessary for you to find that there was such combination if you find that the defendant company, through its officers—who were the superiors of plaintiff in his department of business—acted intentionally, wilfully and maliciously, and caused damage to the plaintiff, the

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plaintiff being entitled to protection as against wrongful acts of the defendant company, whether exercised by it alone or in combination with others. It is for you, however, gentlemen, upon the evidence which has been submitted to you, to determine, as questions of fact, whether the defendant company has, under these rules, either alone or in combination with any other company, or companies, caused the injury complained of by the plaintiff, and it is not for the court to give you any opinion upon this or any other question of fact. You are the sole judges of the weight of the evidence, the credibility of the witnesses, the weight of the testimony, and the inferences of fact to be drawn from the evidence submitted to you in this case on the part of the plaintiff, and also on the part of the defendant.

I have been requested by counsel for the defendant to give you certain rules of law for your guidance, and I do give you the following and correct rules of law which you are to take and consider in connection with all the other rules which I give you in this case. I read requests 1, 2, 3 and 4:

"1. The defendant railway company had the right to make and adopt for its regulation and government and that of its employees, rules Nos. 625 and 626 of its book of rules, whether or not other railway companies also adopted the same or similar rules; and notwithstanding the plaintiff or other employees of said defendant did or did not object thereto.

"2. Notwithstanding the plaintiff may have objected to the adoption by the company of rules 625 and 626, yet if after their adoption he thereafter remained and continued in the service of the company, with knowledge of such rules, he will be taken to have acquiesced in the reasonableness thereof.

"3. The highest obligation which a railway company owes to the public, is to protect the lives of its passengers and employees and property coming into its charge; and in the discharge of this duty, it is not only its right to adopt rules and regulations for the government of its employees as will give such protection, but it is its legal duty so to do.

"4. The safe and successful operation and management of a great railway company necessitates the employment of a great many employees; and the law not only enjoins upon the company, but demands that it shall exercise the maximum of vigilance in their selection and retention in its service; and in this regard the employer is the sole judge of his competency, fitness and reliability."

If, under all these rules which I have given you, you find the issues for the plaintiff and against the defendant, you will then consider the question whether the plaintiff has sustained loss or damage by reason of the acts of the defendant company. And in determining this you will examine the evidence for the purpose of ascertaining what the plaintiff was capable of earning and was earning in his employment as conductor before and at the time of his discharge, and what he had been able to earn and receive since that time. If you fail to find that he was, before and at the time of his discharge, then he has not suffered any damage by reason of the discharge, and your verdict would still be for the defendant.

If, however, you find that he is not able to obtain like employment or earn and receive compensation equal to that which he was before earning and received while in defendant's employment, in any other employ-

ment after his discharge, then you will determine upon the evidence, the difference between that which he was before earning and receiving and that which he was thereafter unable to earn and receive, and such difference would be estimated by you as one of the elements of his damages to be included in your verdict. Further than this, it would then be your duty, in such case, if you find for the plaintiff upon the issues joined, under the rules given, and find that he has sustained actual damages by reason of and since his discharge and down to the present time, you may then in such case also determine what amount of loss or damage it is reasonably certain he will sustain in the future, if any, by reason of such acts of the defendant; and in determining this you will take into account his age and his reasonable prospect of life and probable future earnings after the discharge, as compared with what they would have been but for the discharge, taking into due account all the contingencies of life and health.

The plaintiff, in no event, can have but one recovery for any damages which he has sustained, by reason of the acts complained of by him in this case; and if you find, under all the rules which I have given you, that the plaintiff is entitled to recover and that he has sustained actual damages, and only in case you find he has so sustained actual damages, then you may also include in your verdict, in addition to the actual damages, exemplary damages; that is, damages by way of actual punishment of the defendant, or of warning to others not to commit like acts. The court can give you no certain rule as to the amount of exemplary damages, if you find under the rules which I have given you that the plaintiff is entitled to exemplary damages. You are not required to give any exemplary damages. The giving or not giving exemplary damages and the amount of exemplary damages, if you do give any, rests with you and must be determined by you, in your sound discretion and fair judgment, uninfluenced by any passion or prejudice for or against either party, and must in all respects be such as are reasonable under all the circumstances appearing before you in the evidence.

Two forms of verdict will be handed you—one finding for the plaintiff, with a blank for the amount of damages; and if you find for the plaintiff, the amount of damages will be inserted in the blank and your foreman will sign it and you will return it into court; the other form of verdict is a finding for the defendant, which, if you so find, your foreman will sign and you will return it into the court.

MECHANICS' LIENS—SUBROGATION.

[Lucas Probate Court.]

WILLIAM A. GASHE, ASSIGNEE, V. OHIO LUMBER CO. ET AL.

1. The lien on a mill attaches to all appurtenances, including everything used to drive, but not what is driven; hence it must include not only the engine, boiler and piping, but also the belting, for without each of these there is no mill; but not the planer's tenant-machines, etc., driven to turn out work. Machines sold, not to be set up by the seller, and not put up or used, are not fixtures but personalty.

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2. An agreement, by which one who had furnished and previously put up the boiler and engine, made with a mortgagee, treating them as personalty and waiving his lien on the real estate, cannot affect other lieners, and the boiler and engine being part of the plant are subject to other liens.
3. A mortgagee whose loan went to pay off a purchase money mortgage, is not subrogated to the latter's priority where there was no intention to that effect in the transaction.
4. Subrogation by act of parties may take place by the debtor's agreement that one paying a claim shall stand in the creditor's shoes.

MILLIARD, J.

The Ohio Lumber and Manufacturing Company was incorporated January 12, 1893.

February 4, 1893, said company purchased by contract from John R. B. Ransom, lots 239, 240, 241, 242, 243, 244 and 245, Ransom's Addition to Toledo, Lucas county, Ohio, at an agreed price of \$3,500, \$700 of which was paid in cash, and \$400 to be paid January 15, 1894, \$400 January 15, 1895, \$500 January 15, 1896, and the remaining \$1,500 on January 15, 1897, with interest at six per cent. semi-annually from January 15, 1893. By the terms of this contract said company was given the right to take a deed and give a mortgage back for all unpaid balance at its option.

May 27, 1893, said John R. B. Ransom, without said contract being assigned by said company, deeded the above lots to Bertram L. Paine.

May 27, 1893, Bertram L. Paine mortgaged the above lots to The Mutual Aid Building and Loan Association Company to secure \$5,000 money borrowed by him, and May 27, 1893, said B. L. Paine deeded said lots to The Ohio Lumber and Manufacturing Company.

The application for the above loan, made to The Building and Loan Association, bears the same date, May 27, 1893, as does also the "Waiver of Lien," by Arbuckle, Ryan & Company, as shown by Exhibit "D," attached to evidence herein.

The fact appears to be that the use of Mr. Paine's name in the above deed, mortgage and application for loan was only a convenience, and that all parties knew and understood that it was the property of The Ohio Lumber and Manufacturing Company that they were dealing with, and that Mr. Paine's acts were in fact the acts of the same company.

The waiver above mentioned was duly made by Arbuckle, Ryan & Company, for a consideration of \$1, "and a loan made on said property by the Mutual Aid Building and Loan Company" of their "right to any mechanic's or material man's lien upon said property, in favor of said company, so far as said real estate is concerned. It being understood and agreed that said machinery is not to become a part of the realty until paid for."

Of the purchase price of the property \$700 cash was paid by the Ohio Lumber and Manufacturing Company, \$2,652.73 was paid by the lumber company, May 27, 1893, with interest due, from the money received from said loan company, and the balance of the purchase price was paid by the lumber and manufacturing company from stock in yard.

July 1, 1893, The Toledo Brick Company filed a mechanic's lien with the recorder to secure \$344.20, with interest from July 1, 1893, for materials furnished from February 8 to April 14, 1893.

July 5, 1893, Arbuckle, Ryan & Company secured the balance of their claim by mechanic's lien—\$1,012 with interest from May 1, 1893. The claim was for \$1,625.80 under contract of February 16, 1893, on which there has been paid \$600, of which \$200 was paid by the company from the money received from The Mutual Aid Building and Loan Association, and an agreed credit of \$13.81.

July 22, 1893, Henry P. Tobey filed mechanic's lien for goods, etc., furnished between April 18 and June 9, 1893, amounting to \$292.61, with interest from July 1, 1893.

The Toledo Supply Company filed lien August 3, 1893, for \$55.61 with interest from May 1, 1893. The Shaw, Kendall & Company have a lien also prior to said mortgage.

Baker Brothers have a claim for machinery furnished on which there is still due \$2,463.33 with interest at seven per cent. from June 5, 1893, less payments made July 22, 1893, \$39; July 28, 1893, \$30; August 1, 1893, \$81, and August 21, 1893, \$150.

Said Baker Brothers took possession of this property July 29, 1893, the day of assignment, and were in possession when the assignee went to take possession of the property.

The Mutual Aid Building and Loan Company claim that by reason of money to the amount of \$2,652.73, and interest having been paid to Mr. Ransom for the balance due him on sale of said lots, from the loan by them to said lumber and manufacturing company, they should be subrogated to the vendor's rights in said lands.

As this will affect all lienholders, if the right of subrogation exists, it will be best to consider this claim first.

Subrogation is defined in law to be "the substitution of another person in the place of the creditor, to whose rights he succeeds in relation to the debt."

Subrogation in property rights is classed by law writers as convention subrogation and legal subrogation.

The first is declared to result from the agreement of the parties, and can take effect only by agreement. This agreement, it is said, must, as a matter of course, be with the party to be subrogated, and may be by either the debtor or creditor.

In *Masse. Droit. Commercial*, Lib. 5, title 1, ch. 5, sec. 1, 2, it is said, in illustrating this form of subrogation, that it may happen when the creditor, receiving payment from the third person, subrogates the payee to his right against the debtor.

This must be done, however, by express agreement, though no formal words are required.

It is further said that this sort of subrogation only takes place where there is a payment of the debt by a third person, and not when there is an assignment, as in the latter case subrogation results from the assignment.

The authority says further that this principle is recognized by the common law in cases where, upon payment, the securities are transferred to a party having an interest in payment. Or in case the debtor borrows money from a third party to pay a debt, he may subrogate the lender to the rights of the creditor, for by this change the rights of the other creditors are not injuriously affected. "To make this mode of subrogation valid the borrowing and discharge must take place before a notary; in the borrowing it must be declared that the money has been

borrowed to make payment, and in the discharge, that it has been made with money furnished by the creditor."

I think this ground work is correct, but in the equity practice of the present time, I am satisfied that not nearly so much formality would be required in making the agreement, and that a mere verbal agreement, actually made, would be as readily enforced as would a written one.

Legal subrogation takes place to its full extent according to Domat, Civil Law, Part 1, Lib. 3 title 1, sec. 6.

First—For the benefit of one who, being himself a creditor, pays the claim of another who has a preference over him by reason of his liens and securities. For in this case it is said, it is presumed that he pays for the purpose of securing his own debt; and this distinguishes his case from that of a mere stranger.

Second—For the benefit of the purchaser of an immovable, who uses the price which he paid in paying the creditor to whom the inheritance was mortgaged.

Third—For the benefit of him who, being held with others, or for others, for the payment of the debt, has an interest in discharging it.

In 4 Johns, Chancery 123, 29 Vermont, 676, and the 27 Miss. Rep., 679, it is declared to be a settled rule that in all cases where a party only secondarily liable on an obligation is compelled to discharge it, he has a right in a court of equity to stand in the place of the creditor, and to be subrogated to all his rights against the party previously liable.

In 3 Paige Chancery, 117; 1 Spear's Equity, 37; it is laid down that "in all cases the payment must have been made by a party liable, and not by a mere volunteer."

This rule appears in almost every case examined.

The evidence in this case shows that the Ohio Lumber and Manufacturing Company when making the loan, were met by The Building and Loan Association Company with the requirement that they, the first company, must pay off the debt due on the land, before the deed could be had and mortgage placed thereon. Or, in other words, from the proceeds of the loan; and that the \$5,000 was paid to Mr. Ormond, the president of the Lumber Company, who at once paid Mr. Ransom the balance due him. At that time there was no talk or expectation, so far as the evidence discloses, that the mortgagee or mortgagor either thought of any subrogation; but evidently looked to mortgage alone for security. This view is strengthened when we recollect that the Loan Company, before parting with their money, procured from Arbuckle, Ryan & Company, a waiver of their lien on said land. Then, if not thought of at that time, and the money was not paid to the holder of the vendor's lien, but to the mortgagor, and the owner of the lien for purchase money was paid by said mortgagor, the right of subrogation would certainly not come under the division of convention subrogation.

While the loan was pending, the right to secure subrogation was open, and had it then been provided for, the other lienholders would have had no cause to complain, for, as was said by one of the authorities cited, "by this change the rights of the other creditors were not injuriously affected." Neither does it seem to me that legal subrogation took place, for the loan company was not a creditor or lienholder interested in paying the superior lien on said land to secure its own claim, but it voluntarily furnished the means with which to exterminate the lien of the vendor on said land, and in its place took a new and different security.

Having on the creation of its interest in the lands for the first time, made no provision for acquiring an interest superior to other liens on said premises at that date except as to that of Arbuckle, Ryan & Company, it is not now, as I view it, in the power of any court to give it a preference not then sought.

This, then, brings us to the relation of parties on May 27, 1893, at which time, as shown by the evidence, all liens now on the premises, were then thereon, or in such state of maturity as to relate back and attach prior to that date. These liens were for amounts and in favor of parties following:

The Toledo Brick Company, \$344.50, with interest from July 1, 1893.

Arbuckle, Ryan & Company, \$1,625.80, reduced by payments to \$1,012, with interest from May 1, 1893.

Henry P. Tobey, \$292.61, with interest from July 1, 1893.

The Toledo Supply Company, \$55.61, with interest from May 1, 1893 (?)

The Shaw, Kendall & Company, \$1,437.16, with interest from——

To what do these various liens attach, and in what proportions?

Mechanics' liens are exclusively the creature of statute; and, in Ohio, are given by sec. 3184, Rev. Stat., which, relieved of all that does not apply in the present case, reads as follows:

"A person who performs labor or furnishes machinery * * * for erecting, altering or repairing * * * a mill, manufactory * * * or other building, appurtenance, fixture, bridge or other structure * * * by virtue of a contract with the owner, or his authorized agent, shall have a lien to secure the payment of the same * * * upon such house, mill, manufactory or other building or appurtenance, fixture, bridge or other structure, and upon the material or machinery so purchased, and upon the interest of the owner in the lot or land upon which the same may stand, or to which it may be removed."

The decisions agree in holding that the lien can only be had upon the land, building, mill, manufactory, etc., and the appurtenances, fixtures or structure connected therewith.

Rockel & White deduce from sundry decisions the following definition of what is appurtenances or fixtures, and on page 6, of the Ohio Mechanic's and Sub-contractor's Lien Law, say, that "Whatever is permanently attached to and becomes a part of the premises, is appurtenant thereunto or a fixture therein."

That is, whatever is permanently needed to complete the structure, or mill, etc., and make it capable of performing its intended function, is an appurtenance or fixture, as distinguished from personal property, to which no lien attaches. In a measure each individual case must stand alone, as one kind of a manufactory may not form a correct precedent for a different one.

From my reading of the cases cited in this hearing, I am convinced that anything necessary to the completion of the mill or factory run by this Ohio Lumber & Manufacturing Company to make it possible to operate the work for which it was created, is an appurtenance or fixture—that is, that everything necessary to put in motion the mill or manufactory and apply its power to the different machines used, is machinery,

appurtenance, or fixture in the sense in which these words are used in the statute.

To put it in another form: everything used to drive is a part of the mill, and is machinery subject to lien—

Everything driven to turn out work is personal property.

In *Ross v. Persse*, 29 Conn., 256, it is said: "Work done and materials furnished in equipping a mill with fixed machinery for manufacturing purposes, which is itself a complete and independent structure, cannot be regarded as furnished for the construction or repair of the mill, and no lien attaches."

In *Hall v. St. Louis Mfg. Co.*, 22 Mo. Appeals, 33, it is said: "A lien for the machinery is not a separate lien. It does not attach to the machinery, but to the building or other structure to which it is attached, and indirectly only to the machinery as a part of such building and lot of land.

Now, while these are not Ohio decisions, they are as good, because they define the meaning of words used in our Ohio Lien Law.

To make a direct application of our views as to where fixtures, etc., stop, and personal property begins: When I was a carpenter, we worked out all doors, sash, blinds, etc., by hand. The factory of that day was a big carpenter shop where the joiner worked; his planes, chisels, bevils, grooves, etc., were the appliances by which he wrought all material for finishing, and for the class of work turned out by the Ohio Lumber & Manufacturing Company. Those tools were carpenters' machines, and were directed by his good right arm. Those tools were not the subject of a lien. Now, planers, tenant machines, etc., etc., such as the Baker Brothers placed in this factory are the proud successors of the hand-driven tools of those earlier days, but they are still but tools, and require the mechanic's skilled hand and trained eye to direct them, and make them available.

For that reason they are personal property, and not the subject of mechanic's liens. But not so the mill, its appurtenances and fixtures. Starting with the water-main in the street, and following the pipe, which carries the water to the boiler, the steam to the chest, the belt to the driver, and to the main shafting, and even the small belts to the respective machines, remove any one of these and you have no mill. One link gone, and all is powerless. Each in its place and properly adjusted, and the man in the engine room, out of sight of the most of the works, can move his lever and every piece of machinery will move.

I, at first, revolted against the idea of belting being machinery, but when I saw how worthless was all other machinery without it, I concluded it was at least an appurtenance within the meaning of our lien law.

My holding will therefore be that everything going to supply power will be subject to lien, and that everything to which power is supplied from the completed mill is personalty. Under this ruling, of course, Baker Brothers will hold their chattel mortgage property.

Under the same ruling, The Toledo Brick Company, H. P. Tobey and The Toledo Supply Company will have no trouble in determining to what their liens attach and for the full amount. The lien of The Shaw, Kendall & Company, will also attach for everything, except the Sturtevant Fan and portions of belting.

The evidence shows that the fan was sold at the shop or store of The Shaw, Kendall & Company, and was sent to the mill, not to be by

them set up, but to be used by The Ohio Lumber & Manufacturing Company, and that it had never been put up or used, but was still in the mill.

Jones on Liens, vol. 2, page 308, says: "There can be no lien for machinery made away from the premises to which the purchaser intends to attach it, and which is merely furnished to the purchaser, and not connected by the maker with the premises to be charged.

In a case reported in the 37 Mich., 313, the same doctrine is announced, and even more strongly.

Under our statute, "A person who performs labor, or furnishes machinery for erecting a mill, etc. shall have a lien to secure the payment of the same upon * * * such * * * mill, etc., and upon the machinery so purchased and upon the interest of the owner in the lot or land on which it stands."

As this fan has never been set up in the mill, was sold not to be set up by the seller, was taken to the mill and left there to be done with as the purchaser saw fit, and has never been attached so as to become a part of the machinery, or an appurtenance or fixture of the plant, I am forced to the conclusion that it is only personal property, and not subject to lien.

As to the belting not used and from which enough was to be taken to supply what the lumber company wanted, and the balance to be returned, credit must be given by The Shaw, Kendall & Company on their lien and account for the un-used portion, which they can then be entitled to take.

As to the lien of Arbuckle, Ryan & Company—the boiler and engine furnished by them became a part of the real estate so soon as permanently placed in the mill by them, long prior to May 27th, and as such, the liens of all lienors attached in common with their own. On May 27, 1893, by special agreement between themselves and The Mutual Aid Building and Loan Association Company, their lien was waived, as to the real estate, and by said agreement the boiler and engine was to be considered personal property until paid for. This agreement, of course, could affect no lienor but themselves and the loan company. As the boiler and engine were a part of the plant, and real estate, the liens of all lienors attached to the same in common with all other parts of machinery, appurtenances and fixtures, varied only by the waiver or agreement between Arbuckle, Ryan & Company, and the Loan Company.

As between said Loan Company and Arbuckle, Ryan & Company, the boiler and engine are not a part of the real estate, and the loan company has no mortgage lien thereon. As to everything that is included as a part of the property subject to liens, other than the boiler and engine, the lien of the loan company's mortgage is superior to the lien of Arbuckle, Ryan & Company.

The court finds that the entire property, including all the lots purchased of Mr. Ransom, was used as one property, and all formed the mill plant, and that the liens all attach to the entire real estate from lots 239 to 245, inclusive.

The order of the court will therefore be that Baker Brothers be awarded the property covered by their chattel mortgage; that the Shaw, Kendall & Company take the surplus belting left by them at the mill, and credit the proper deduction on the amount of their lien, and also the price of the Sturtevant Fan, and that they then have a lien for the

remainder of their dues in common with the Toledo Brick Company, The Toledo Supply Company, H. P. Tobey and Arbuckle, Ryan & Company on the entire real estate, machinery, appurtenances and fixtures, and the interest of the Ohio Lumber & Manufacturing Company therein; that all said property be sold, and if the proceeds of such sale be sufficient, there be first paid therefrom in full, the liens of The Shaw, Kendall & Company, The Toledo Brick Company, The Toledo Supply Company, and H. P. Tobey; that the amount of the lien of Arbuckle, Ryan & Company be withheld until the debt due the Mutual Aid Building and Loan Company be satisfied, less the value of the boiler and engine—should the property not sell for enough to pay all parties in full—and the value of the boiler and engine to be paid Arbuckle, Ryan & Company; should said property not sell for enough to pay all claims in full, said The Shaw, Kendall & Company, The Toledo Supply Company, H. P. Tobey and Arbuckle, Ryan & Company, shall pro rata according to the amount of their claims as fixed, and all paid their pro rata share, except Arbuckle, Ryan & Co. whose pro rata share shall be postponed to the lien of the Loan Company's mortgage, except in so far as their share of the proceeds of the boiler and engine are concerned, which sum shall be paid to Arbuckle, Ryan & Company.

POLLUTION OF STREAM.

[Hamilton Common Pleas.]

BURCH & JOHNSON ET AL. V. STATE OF OHIO.

Memorandum of opinion.

1. In a prosecution, under sec. 6921, Rev. Stat., for the pollution of a stream, each party is entitled to offer the best available proof of the condition of the water; and, where it appears that the sewage conditions complained of were the same subsequent to the date of the information as prior thereto, the best proof, from a chemical standpoint, is the analysis of the water taken at times thereafter as it ran in the stream.
2. An error in excluding the best proof, above defined, as to the condition of the stream subsequent to the date of the information, is not waived nor cured by the admission of an analysis of the water by the same witness made prior to the information.

When a witness for the prosecution had testified to the corrupt and offensive smell of water as it left defendant's drain, cross-examination tending to show that the water was pure at the point where it left defendants' premises was pertinent as bearing on the issue, whether the corruption was to the prejudice of others and its refusal was substantial error.

No amount of corruption by one person can excuse the wrongful acts of another, but evidence tending to prove corruption of the stream both above and below defendants' premises, was competent to show that corrupt matter found in the water was not put there by defendants and its rejection was substantial error.

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5. The court is of the opinion that proof of the record of the board of health of the township, (adjoining the corporate limits of Cincinnati), having jurisdiction, showing that they had examined, approved and given defendants a permit to construct their system of drainage, which it is alleged, corrupted the stream, is competent in a prosecution, under sec. 1788, Rev. Stat., in the police court of Cincinnati, at least in mitigation of the penalty.
6. Whether such proceeding and permit by the board of health would be a complete defense in a prosecution on a criminal charge, quare?
7. If a complete defense in such prosecution it would not, however, be a bar to a recovery of damages at the personal suit of a neighbor, nor in an action in equity to enjoin a private nuisance, doing special injury to the person or property of another.

BUCHWALTER, J.

The plaintiffs in error were found guilty in the police court of unlawfully corrupting Crawfish creek, a public stream, by draining sewerage therein from premises owned and controlled by them, to the prejudice of others, at the city of Cincinnati, and within the jurisdiction of the court, on May 2, 1894.

The trial record is voluminous, and the errors claimed and considered in the argument are numerous.

The offense charged is a misdemeanor, for the violation of the state law, sec. 6921, Rev. Stat. Crawfish creek flows by the premises of plaintiffs in error, in Columbia township, and thence through Cincinnati to the Ohio river. There is no proof showing that they corrupted the stream in the corporate limits of Cincinnati, but proof tending to show that they did so in Columbia township.

The sewerage complained of was drainage from the water closets of a new tenement house, passing through a drain pipe (supplied with a strong current of Spring water) for about 300 feet into a covered vault, and thence by a covered drain of gravel, broken stone, lime and charcoal for about 150 feet; thence in Crawfish creek on their own premises, in all about 1,000 feet; thence through various farms and country places, in all about 800 feet, passing out of Columbia township into Cincinnati, nearly one mile, until finally into a large city sewer, extending up the creek from the Ohio river.

In the trial of the cause, the testimony of the witnesses was given as to their knowledge of the stream, obtained through the natural senses, and the testimony of experts making scientific tests of the water.

The prosecution gave in proof the analysis of samples of water taken on May 14th, above and below the drainage in controversy; also proof as to samples of water taken January, 1894. No sample was taken as of the date, nor within five days of the date named in the information; viz., May 2, 1894.

The defense on the trial tendered, by their witness, Dr. Dickore, samples of water taken at the entrance of their drain into the ravine on May 17, 1894; also to show its chemical analysis, and also tending to show that the same conditions existed as to their sewage and the water, then, and during all the intervening time from the date named in the information, and tendered to show that said water, as per sample, was without smell and in far better condition, as to purity, where it left their premises on this stream, than where it entered them. The prosecution objected to this proof, which objection the trial court sustained. This

ruling was clearly error to the prejudice of the defendants on trial. Each party was entitled to offer the best available proof upon the issue. The water in the creek did not stand still on May 2d; it ran on without waiting for time and men; therefore, the best proof from a chemical standpoint was the analysis of the water, taken at times thereafter as it ran in the stream, provided it were shown that substantially the same sewage conditions existed as of the date of the charge in the information. The analysis of the samples of water taken May 14th, and offered by the prosecution, had no higher claim to competency on the charge of corrupting the stream of water May 2d, than the analysis of samples of water taken on May 17th, offered by the defendants. This error was not waived, nor was it corrected by the previous admission of an analysis of samples of water taken in March previous by the same witness.

Again, the prosecution called a witness who testified to the corrupt and offensive smell of the water as it issued from defendants' drain into the creek, and the court sustained an objection to a cross-examination seeking to show that the water was pure and clean at the point where it leaves their premises.

Such cross-examination was pertinent to the issue as to whether the corruption of the water was to the prejudice of others, and its rejection was substantial error.

The defendants, in the trial court, sought persistently to prove the corruption of the water by the drainage of animal manure from stables and fields, and seepage from private vaults near by, of corrupt material, draining into the creek both above and below their premises. Such testimony by some of the witnesses was admitted, but from others refused.

The court excluded the same on the ground that no amount of corruption by others can excuse the defendants for their wrongful acts, which is a correct proposition of law, but the proof was nevertheless competent and of vital importance, as tending to show that the corrupt matter found in the water was not put there by the defendants, and the rejection of such proof was substantial error.

For the foregoing reasons the judgment herein must be reversed.

Another feature of the trial raised an interesting legal question, which I do not determine, but submit as worthy of careful study before any other trial.

The plaintiffs in error offered to prove the record of the proceedings of the board of health (the township trustees) of Columbia township, showing that they had examined, approved, and given a permit to construct their system of disposing of the sewage in the manner shown at the trial.

These premises were within the jurisdiction of Columbia township, and the trustees were the only official board having the power to abate the nuisance or regulate it.

The board of health of Cincinnati have no jurisdiction in such matters outside the corporate limits of the city. The police court, however, had jurisdiction to try this case under section 1788, Rev. Stat., it being within four miles of the city limits, and the charge being a misdemeanor under the state law. I am of opinion that proof was competent, at least, upon mitigation of the penalty, showing an effort to comply with the direction of public authority having jurisdiction.

Whether such proceeding and permit by the board of health of Columbia township would, in law, in a prosecution by the public, on a

criminal charge, be a complete defense is a serious question, and one which I submit to counsel for further consideration.

If a complete defense in such prosecution, it would not, however, be a bar to a recovery of damages at the personal suit of any neighbor injured, nor in an action in equity to enjoin them from doing that which was a private nuisance, doing special injury to the person or property of any neighbor.

For grounds before stated the judgment is reversed, at the costs of the city, and cause remanded to the police court for further proceeding.

Burch & Johnson, for plaintiffs in error.

J. C. Hart, for defendant in error.

RAILROAD FENCES—NEGLIGENCE.

[Lucas Common Pleas.]

GEORGE DIDMAN V. MICHIGAN CENTRAL RY. CO.

1. A railroad company having constructed good and sufficient fences along its right of way, owes no duty to an adjoining owner to see that a gate in such fence which is used exclusively by such owner is kept closed.
2. The company is not liable absolutely and at once for defects in its fence caused by a third person without its fault. Having built a sufficient fence, it is not liable for defects unless it is negligent.
3. As good and sufficient fences were erected and maintained upon each side of the railroad companies right of way, the company was under no obligation to erect a gate on the crossing between the two tracks.
4. In Ohio in order to make out a prima facie case, in an action against a railroad company to recover damages for killing stock, it is necessary for the plaintiff to prove affirmatively that the servants in charge of the train were guilty of negligence and that the injury was caused by such negligence.

PUGSLEY, J.

Motion to direct a verdict for defendant in an action to recover damages for cattle killed by the defendant's train. It was charged that the defendant was negligent in omitting to properly fence its track and in running the train at a rate of speed prohibited by a city ordinance. The testimony on the part of the plaintiff showed the following facts: In the northwesterly limits of the city the railroad of the defendant and that of the Lake Shore Railway company run for a considerable distance side by side and parallel with each other, the defendant's road being on the easterly side. Good and sufficient fences had been erected by the companies, one on the easterly line of the defendant's right of way and one on the westerly line of the Lake Shore right of way and at the time of the accident these fences were in good order and repair. The plaintiff, a dairyman, occupied a large field on the westerly side of the tracks where his cattle were pastured and a smaller field on the easterly side where his house and barn were situated.

A few months before the accident at the request of the plaintiff and solely for his convenience, the companies built a private crossing over

both tracks to connect these two fields. A proper gate was placed at each end and suitable fences and cattle-guards were constructed to make the crossing complete and on the day of the injury everything pertaining to the crossing was in good order and repair. On the afternoon of November 1, 1892, the gate at the west end of the crossing was opened by some person and the plaintiff's cattle passed or were driven through the open gate from the pasture over the crossing and upon the defendant's track, where they were killed by the regular daily passenger train from Detroit. The evidence did not disclose who opened the gate, but it was opened shortly before the time when it was usual every day for the plaintiff or his employees to drive the cattle over the crossing from the west field to the east field. There was no evidence tending to show that the gate was opened or was seen to be open by any employee of the defendant. There was no evidence that the crossing or gate was ever used by the defendant or any of its employees.

An ordinance of the city prohibits a greater rate of speed than ten miles an hour. It was admitted that the train was running twenty-five miles an hour. The track was straight on each side of the crossing for a quarter to half a mile. There was no evidence as to the operation or management of the train other than the rate of speed. The court held :

1. As the gate was used exclusively by the plaintiff and his employees, the defendant owed no duty to him to see that it was kept closed. 114 Ind., 447, 27 Mo., app, 418, 59 Mich., 618, 58 N. H., 251. But if it was the duty of the defendant to keep the gate closed, there was no evidence to charge it with negligence in that respect. The company is not liable absolutely and at once for defects in its fence caused by a third person without its fault. Having built a sufficient fence, it is not liable for defects unless it is negligent. 43 O. S., 270; sec. 3324 R. S.

2. As good and sufficient fences were erected and maintained upon each side of the railroad companies right of way, the defendant was under no obligation to erect a gate on the crossing between the two tracks. The manifest purpose of the statute is to exclude cattle from the tracks, by erecting a proper fence on the line of the abutting owners land. Neither railroad company is such abutting owner. Sections 3324, 3326 Rev. Stat., *Railway Co. v. Allen*, 40 O. S., 206; furthermore the crossing was constructed at the request of the plaintiff and to his entire satisfaction. Not needing and not requesting a gate between the two tracks, he cannot now complain of the omission of a gate at that point; sec. 3327 Rev. Stat.

3. There is no evidence that the injury might have been avoided by the exercise of ordinary care, if the train had been running at the rate of only ten miles an hour. It does not appear where the train was when the cattle got upon the track—nor when the engineer first saw the cattle or might have seen them. Hence it is not shown that the excessive speed of the train caused the injury. This is necessary. In Ohio in order to make out a prima facie case, in an action against a railroad company to recover damages for killing stock, it is necessary for the plaintiff to prove affirmatively that the servants in charge of the train were guilty of negligence and that the injury was caused by such negligence, *Railroad Co. v. McMillan*, 37 O. S., 554; *Railroad Co. v. Bailey*, 11 O. S., 333, 338. When the only proof is the death of the animal and the failure of the defendant to comply with some statutory

duty running the train, it is the duty of the court to declare as a matter of law that the plaintiff cannot recover. 62 Mo., 562.

These views made it unnecessary to consider the question of contributory negligence on the part of the plaintiff. The motion was granted and the jury directed to return a verdict for the defendant.

STREET ASSESSMENTS—STATUTES.

[Lucas Common Pleas.]

TOLEDO (CITY) FOR USE ETC. V. TOLEDO SAVINGS BK. & TRUST CO.

Section 2283, Rev. Stat., applies only to property abutting on one street and assessed for improvement there and afterwards assessed for the improvement on another street; and an improvement of a street by first paving and afterwards by building a sidewalk does not come within the provision of this section; and it was further held, that if this section had contemplated limiting the assessment on one street, the words "on two streets" as used in this section would have been omitted.

This case involved the construction of sec. 2283 Rev. Stat., which placed additional restrictions on assessing property for improvements.

LEMMON, J.

Court held that that section applied only to property abutting on one street and assessed for improvement there and afterwards assessed for the improvement on another street; and that the improvement of a street by first paving and afterwards by building a sidewalk did not come within the provisions of sec. 2283, Rev. Stat.

That section states, in placing additional restrictions on assessing property in cities, that it shall not be assessed, beyond a certain limit, for making improvements "on two streets or avenues within a period of five years." Held that if the law had contemplated limiting the assessment on one street, in the manner urged by counsel the words "on two streets" would have been omitted.

STREET ASSESSMENTS.

[Lucas Common Pleas.]

WM. E. COLE V. SAMUEL A. HUNTER, TREAS.

Where an assessment was made upon a lot for paving the street, and two years afterwards another assessment was made upon the same lot for a stone sidewalk in front of the lot upon the same street: Held, that under sec. 2271, Rev. Stat., the two assessments could not be added together in applying the limitation in such section, but that each assessment was valid to the extent of twenty-five per cent. of the value of the lot after the improvement was made, for which the assessment was levied.

This was an action to enjoin the collection of two assessments.

PUGSLEY, J.

An assessment was made upon a lot for paving the street. Two years afterward another assessment was made upon this lot for a stone sidewalk in front of the lot upon the same street. The aggregate of the two assessments exceeded twenty-five per cent. of the value of the lot. The question was whether the limitation in sec. 2271, Revised Statutes applies to each assessment separately or to the aggregate of both assessments. That section provides that "the assessment specially levied upon any lot for any improvement shall not in any case exceed twenty-five per cent. of the value of such lot after the improvement is made." It is not claimed that the case came under sec. 2283 Revised Statutes, which provides a special limitation when a lot is assessed "for making two different streets within a period of five years." The court held that under sec. 2271, Rev. Stat., the two assessments could not be added together in applying the limitation, but that each assessment was valid to the extent of twenty-five per cent. of the value of the lot after the improvement was made, for which the assessment was levied.

PAYMENT OF LEGACIES.

[Lucas Probate Court.]

IN RE ESTATE OF FRANCIS P. ISHERWOOD.

1. The probate court has jurisdiction in a cause of action brought by a legatee to compel the executor to show cause why the balance of the legacy should not be paid to such legatee.
2. Legatees are entitled to demand payment of their legacies within the four years limited for the presentation of the claims of creditors, upon a satisfactory showing to the probate court, and the giving of an undertaking to the executor, if any be required by the court.

MILLARD, J.

In re estate of Francis P. Isherwood. Petition of Lizzie M. Isherwood for order to show cause why balance of legacy should not be paid her. Demurrer by executors.

November 13, 1882, Francis P. Isherwood executed his last will and testament which has been duly admitted to probate and record in this court.

In said will he bequeathed to his daughter, Libbie Maria Isherwood, the sum of \$10,000 to be paid her by his executors out of his estate in installments as they "think best or the situation of circumstances may require." He nominated two executors, W. S. Lamb and Leander Burdick, and also specified that they were to be guardians of said Libbie Maria Isherwood as well, with full power to manage and control or invest at their own discretion, the \$10,000 willed her.

Said Lamb having died, a codicil was written by testator to said will naming Walter J. Chase and Eugene W. Gage as executors of his estate and guardians of said daughter, but revoking the clause of said will conferring power on said other gentlemen named as executors and guardians.

Lucas Probate Court.

August 7, 1893, this will was filed in the probate court of Lucas county, Ohio, for probate, the daughter having in the meantime become of age, and on August 10th, letters testamentary were issued to said Chase and Gage to administer said estate. March 27, 1894, said Libbie M. Isherwood filed with probate court her petition for an order citing said executors to show cause why they should not at once pay to said legatee the sum bequeathed her by her father.

In said petition she alleges that on February 17, 1894, there was paid said executors \$15,071.46 and that they also had in their possession a large amount of other assets, that deceased left no debts, and that no debts are outstanding against said estate which are entitled to preference over the claim of petitioner, except the allowance to the widow for one year's support, \$3,000.

Petitioner also says that she has no means of her own, other than this legacy and that the executors have begun in the common pleas court a proceeding adverse to her interests in said estate and that she has no means to employ counsel and protect her rights before said court, and that said executors have notified her that they will pay her no further part of said legacy until such time as they see fit. To this executors interpose a demurrer for the following reasons:

First—Said petition does not state facts sufficient to constitute a cause of action.

Second—Said petition does not state facts sufficient to entitle petitioner to the relief prayed for.

Third—The court has no jurisdiction of the cause of action.

Fourth—Said petition is premature for the reason that it does not show that eighteen months have expired since the executors filed their bond, and that all debts of said estate have not been paid, and an order of distribution to heirs and legatees has been made by this court.

For the purpose of this decision the first and second grounds of this demurrer will be considered as one.

As the case stands now the demurrer is an admission of the truth of properly pleaded facts set out in the petition. These facts are that no debts exist against the estate of deceased; that a large sum of money is in the possession of the executors belonging to said estate and applicable to the payment of petitioner's claim; that she is being put to the necessity of employing counsel to defend her property rights in another court by these executors and that they refuse to advance her of her legacy with which to help herself to defend; that no debts exist for the payment of which the money on hand will be required.

I think these facts are sufficient to warrant overruling the first two grounds of the demurrer.

As to the third ground of the demurrer, going to the jurisdiction of the court.

Section 523, Rev. Stat., declares that "there is established in each county of this state a probate court," etc.

Section 524, Rev. Stat., reads: The probate court shall have exclusive jurisdiction, except as hereinafter provided.

"First to take proof of wills, etc.

"Second—To grant and revoke letters testamentary and of administration.

"Third—To direct and control the conduct and to settle the accounts of executors and administrators, and to order the distribution of estates," etc., etc.

In the case of *Disney v. Howes*, 9 Ohio Dec., Reprints, 406, decided by the Hamilton county district court, that court holds that :

First—The probate court has the power to pass on the validity of the claims of legatees, and order their payment before final distribution of the estate :

Second—Legatees are entitled to demand payment of their legacies within the four years limited for the presentation of the claims of creditors, upon a satisfactory showing to the probate court, and the giving of an undertaking to the executor, if any be required by the court."

From the reading of sec. 524, Rev. Stat., and the wording of the above decision I am led to believe that this court has full jurisdiction of this cause of action.

As to the fourth ground, that the action is premature, because eighteen months have not elapsed since executors filed bond, etc. While it is true that by terms of sec. 6113, Rev. Stat., creditors have four years within which to present claims against an estate, and that the executor who distributes an estate before that time may become responsible should debts mature prior to the lapse of such period, yet the question in this case is whether under all the circumstances surrounding its present condition this court has the right and power to order payment of this legacy.

The rights of creditors are superior to those of legatees and in considering the present petition we need consider the sections of statutes referring to creditors, claims no further than to bear in mind at all times the superiority mentioned.

As bearing on this question of premature application by petitioner, I regard the decision of the case of *Disney, excr., v. Howes*, supra, as being quite in line and decisive. The second clause of the syllabus says that, "Legatees are entitled to demand payment of their legacies, within the four years limited for the presentation of the claims of creditors, upon a satisfactory showing to the probate court, and the giving of the undertakings to the executor, if any be required by the court."

In the case of the *Bible Society v. Weddell*, Judge Williams in delivering the opinion of the Supreme Court, on page 147, says, in discussing the rights and liabilities of executors, legatees, etc., "It may be fairly inferred from the statute that a legatee can require the payment of his legacy before the expiration of the four years; but when he does, he may be compelled to give bond and security therein provided for."

In *Dawson v. Dawson*, 25 O. S., 443, this same doctrine is recognized and the court say that a legatee or distributee cannot maintain an action on the bond against an executor, etc., etc., within the four years allowed by law for creditors to present their claims without an order of the probate court requiring such payment. This clearly shows that the Supreme Court are of the opinion that a legatee may sustain an action against the executor within the period of four years, and that the sound discretion of the court may be called upon to say whether and on what conditions such legatee may receive relief.

In the case of *Dawson et al. v. Patterson et al.*, 16 Atl. Rep., 38, decided by the Supreme Court of Pennsylvania, the court, in discussing the discretion of executors, placed with them by testator in his will, as to payment of legacies, etc., the court says: "The court can direct such legacies to be so paid, notwithstanding the discretion given to the trustees, when, after the lapse of a reasonable time since the death of

testator, it appears that a portion of the estate can be sold for that purpose without loss or injury."

From this, and especially from the determinations of our own Ohio courts, I am led to believe that this action is properly brought, and will have to overrule the fourth ground of demurrer.

Now, as to the propriety of court granting the prayer of the petition. About seven (7) months have elapsed since said executors gave bond, etc. The time within which debts are to be proven has not yet elapsed. Ordinarily it would not do to order distribution of an estate at so early a period; but there are some things shown by the records of this court of which we can take judicial notice, that have a bearing on this case and will be something of a guide for action:

First—The estate is one of considerable value; it is largely composed of real estate.

Second—The business in which deceased was engaged was a partnership, and the surviving partner has elected to and has taken said business, or the interest of deceased therein, at its appraised value, and paid same to executors in cash, and has also given bond to the satisfaction of this court for the payment of all debts of said co-partnership.

Third—By the terms of the will of said Isherwood this legacy was made payable out of the corpus of the estate, and not from income or personal estate only.

By the laws of Ohio governing executors and administrators they are required to "proceed with all diligence to pay the debts of deceased," and to administer estates; and that they should settle as speedily as possible is the rule of all decisions. That when debts are all paid it is the duty of executors to pay legacies and make distribution of the remaining estate is well settled and recognized.

That no unnecessary delay may arise it is provided by sec. 6189, Rev. Stat., that legatees, etc., may provide for payment of debts by leaving sufficient in hands of executors and distribute in kind the remainder of the estate.

That the condition, age and surroundings of a testator may be taken into consideration by courts in determining probabilities which necessarily enter into any calculation to be made is, I believe, well established.

Then, what should be done in this case? The testator was a man well along in life. For some years he had lived leisurely and was more than ordinarily careful and prudent in his matters of expense. The debts for which he might have been liable, growing out of his co-partnership transactions, are provided for by the bond of the surviving partner; a large surplus of cash in bank, with a small possibility of any debts ever turning up against the estate for which any part of it may be required to pay. Against any debts, so far as this legacy is concerned, stands the entire real estate of deceased. That we could order this legacy all paid to the petitioner, by requiring a bond of indemnity or to return, if needed, is beyond question in the mind of the court. Should it be made at present without such bond? The court believes it safe to so order, but, at the same time, it should always guard its officers from all possible risk or danger and should leave them, as near as justice will permit, with all the safeguards that the law throws around them.

Under the peculiar circumstances of this case, with a suit pending against petitioner which she is unable to defend without a portion of this legacy, and which if not defended she fears will lose to her valu-

In re estate of Francis P. Isherwood.

able property rights, and being so situate that to compel her to give a bond when not absolutely necessary, would work to her a great hardship. I am of the opinion that good conscience requires that I make an order that the executors of said Francis P. Isherwood pay over to said legatee, Libbie Maria Isherwood, without requiring of her a bond to refund in case later found indebtedness should require it, the sum of \$3,000, less what she has heretofore had on said legacy from said executors. It is so ordered.

Exceptions noted.

COMMON CARRIER.

[Lucas Common Pleas.]

T., A., A. & N. M. Ry. Co. v. M. C. Ry. Co.

Where one railroad permits another road to use a portion of its tracks, such railroad in permitting the use of its tracks is performing the duty of a common carrier in supplying an instrumentality of transportation, and can charge only a reasonable sum for such use, the same to be determined by the jury.

HARMON, J.

The M. C. R. R. Co. used tracks of the T., A., A. & N. M. Ry. Co. from Alexis to the Pennsylvania depot. The latter company charged for such use, in the beginning fifty cents per car, but subsequently increased the charge to \$1.00 per car and later to \$2.00 per car. Defendant company paid the charges at the rate of fifty cents per car and at the increased rate of \$1.00 per car. They refused to pay at the rate of \$2.00 per car but continued to use the tracks.

On the first trial the court held that the T., A., A. & N. M. Ry. Co. in permitting such use of its tracks by the M. C. R. R. Co. was not performing the duty of a common carrier and therefore had a right to charge whatever they saw fit for the use of said tracks; and that the M. C. R. R. Co. could elect whether it would use said tracks and pay what the T., A., A. & N. M. Ry. Co. elected to charge or not. A verdict for about \$19,000 was returned for the plaintiff.

Defendant filed a motion for a new trial and upon a further consideration of the facts the court held that the T., A., A. & N. M. Ry. Co., in permitting the use of said tracks, was performing the duty of a common carrier in supplying an instrumentality of transportation and and could charge for such use only a reasonable sum; that evidence as to whether or not the charge of \$2.00 was a reasonable one should have been left to the jury and that the refusal to permit evidence tending to show that \$2.00 was unreasonable was error.

Verdict set aside and new trial granted.

APPROPRIATION OF PROPERTY.

[Lucas Common Pleas.]

MYERS V. TOLEDO (CITY).

Where a city has taxed, for street improvements, the property within its limits, and afterwards commences condemnation proceedings to obtain possession of it: Held, that such proceedings give no rights to individuals who may be notified to pay taxes or assessments, or who may be brought into court upon condemnation proceedings; and such individuals have no occasion to notice such proceedings, and if they do and pay money expecting to get title, they do it at their peril.

This is an action to recover a specific parcel of real estate lying within the limits of Sixteenth street, between Jefferson and Monroe streets.

Plaintiff alleges that she is the owner of property and entitled to possession and that defendant wrongfully withholds it.

The city sets up three defences:

First—A general denial. Second—Possession and use as a public street in the city of Toledo for more than twenty-one years. Third—Dedication for street purposes by James Myers, from whom plaintiff claims to derive title.

The reply denies the city's possession for twenty-one years and alleges plaintiff's (and those under whom she claims) possession for more than twenty-one years; also denies dedication and alleges that the city is estopped from claiming the property within the limits of the city by having taxed for street improvements, and otherwise, and also by reason of having commenced condemnation proceedings to obtain possession of it; also alleges that the questions have been adjudicated in an action wherein J. W. and Sarah M. Myers were plaintiffs and the city defendant in 1866 in the district court of this county.

HARMON, J.

Plaintiff showed a regular chain of record title from the government to herself and the issue made by general denial found for the plaintiff.

The issue made by city's claim of use for street purposes found for plaintiff, such use not being established; court finds that James Myers et al. in executing what is called the "Gower map," and in a decree of partition in an action in the old court of chancery in this county in 1846, and by the conveyances of James Myers of land platted upon the Gower map since that time, dedicated Sixteenth street.

On the issue made in the reply in which plaintiff alleges that she, and those under whom she claims, have been in possession of the property for more than twenty-one years, the court finds that James Myers took possession of the property, in 1846, with other property, and immediately inclosed it; that that inclosure continued until about 1864, when the fences became dilapidated and the land was thrown open to commons. Court also finds that James Myers' possession was not adverse; that it was temporary and consistent with his dedication of the streets through that tract, the city or the public not having occasion at that time to use the said streets.

On the allegation of estoppel by taxation, assessment and proceedings to condemn for street purposes, it is held that such proceedings give

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no rights to individuals who may be notified to pay taxes or assessments or who may be brought into court upon condemnation proceedings; that individuals have no occasion to notice such proceedings and if they do and pay money expecting to get title they do it at their peril.

The decree of the district court in April, 1866, adjudged J. W. and S. M. Myers to be owners of the land at that time claimed by the city to be within the limits of Fourteenth street between Jefferson and Monroe streets. Plaintiff here claims through J. W. and S. M. Myers but the finding and decree of the district court should not be extended beyond the land described in that case, the title to which was quieted by that decree in J. W. and Sarah M. Myers. Moreover this question of adjudication by district court in 1866 was, in substance, passed upon and decided against plaintiff by our circuit court in a recent decision in Reynolds v. Newton et al.

Judgment for defendant.

BILLS AND NOTES—BANKS.

[Lucas Common Pleas.]

DUNN V. DEWEY.

Where a note is deposited with a bank for collection, it has no authority to accept anything but money as payment; and, therefore, giving a check, which the bank accepted, is not payment.

HARMON, J.

Plaintiff filed his petition and alleged execution of the note by defendants; set forth a copy of the note with endorsements; stated that it was unpaid and that there was due on it the sum of \$2,900.12.

Defendants, in their answer, alleged that on the day the note became due they deposited with the First National Bank of Toledo a check for the amount due on the note and that plaintiffs deposited the note with the First National Bank for collection. The defendants alleged that the bank accepted the check, charged it to defendants and gave plaintiffs credit for that amount and marked the note paid and the defendants say, the note was paid "with the aforesaid." Plaintiffs then filed a supplemental petition making the First National Bank a party defendant.

In their supplemental petition plaintiffs reiterated all the allegations of the original petition and referred to defendants' answer and alleged that if it was true, as stated, that the bank was a necessary party to the action and held to the payment of the money.

The bank filed a demurrer to the supplemental petition.

The court holds: That the note could only be paid in money unless the plaintiffs accepted something else in lieu of money and that the note being deposited with the bank for collection it had no authority to accept anything but money as payment; that whether the answer of defendants constitutes a defense it is not necessary to decide, but that the supplemental petition alleges no facts which constitute a cause of action against the bank.

Demurrer sustained.

GUARDIAN AND WARD.

[Lucas Common Pleas, March 3, 1894.]

FIRST NATIONAL BANK OF BELLEVUE V. MERCHANTS NATIONAL BANK OF TOLEDO.

Where the testator owned stock in a bank, such bank has no authority to issue the stock to the guardian of testator's minor children, as such stock could only be lawfully issued to the administrator; and, therefore, stock issued to such guardian in return for stock owned by the estate, will be set aside.

The action related to thirty shares of the capital stock of the Merchants National bank of Toledo which was part of the stock owned by Virginia B. Warn and standing in her name at the time of her death in 1877. Her husband, Monroe C. Warn, was appointed guardian of their two minor children and in 1878 the bank issued to him as guardian a certificate for the stock in controversy, in exchange for a similar certificate of Mrs. Warn's stock. June, 1890, Warn gave to the plaintiff a judgment note for \$3,300, payable on demand and as collateral security endorsed and delivered to plaintiff said certificate held by him as guardian. The plaintiff claims the stock by virtue of such pledge and asks that the stock be sold for the payment of such note. The defendant, Aletta B. Warn, admx. of the estate of Virginia B. Warn, claims the stock as a part of the assets of said estate and needed for the payment of debts against said estate. It was alleged by the plaintiff that the money received by Warn for the note was used by him in improving the homestead on Ashland avenue, which was owned by the children subject to their father's life estate, and that on June 2, 1891, Warn delivered to the children a deed of conveyance of his life estate in consideration of his pledge of the stock to the plaintiff, and based upon these allegations, numerous legal questions were raised and discussed.

PUGSLEY, J.

The court held that the Merchants Bank had no authority to issue the stock to Warn as guardian. It belonged to the estate of Mrs. Warn and could be lawfully issued only to the administrator, and it was found from the evidence, aside from any question as to the power of the guardian to pledge the stock, that the plaintiff did not occupy the position of a bona fide holder. No money was loaned to Warn at the time of the pledge of the stock and the position of the plaintiff was not in any respect changed on account of the transfer of the stock. It was pledged to secure the personal debt of Warn contracted in 1887, for which he gave his note and which note was renewed from time to time until the demand note of June, 1890, was given.

It was further found that no part of the money received by Warn from the plaintiff was used in improving the homestead and that none of it was borrowed for that purpose and also that the allegation of an acceptance by the children of their father's life estate in place of the stock was not sustained by the proof. And it was held that such an agreement, if proved, would not be binding on the children in equity. Since becoming of age they have done everything that was possible to repudiate any arrangement by which it was sought to deprive them or

Bank v. Bank.

their mother's estate of the stock. The court held that the administratrix was entitled to the stock and that plaintiff had no equities in it as against her claims or the claims of the children. A decree was rendered finding the equities of the case with defendants and ordering the cancellation of the certificate in question and the issuing of a new certificate for a like amount to the administratrix.

ADMINISTRATORS—INTEREST—STATUTES.

[Lucas Common Pleas.]

IN RE ESTATE OF WILLIAM THORNTON.

1. Under the provisions of sec. 6191, Rev. Stat., an administrator is charged with interest on balance of funds remaining in his hands after filing his final account.
2. The word "may" as used in sec. 6191, Rev. Stat., means must, and imposed upon the administrator the duty of investing such funds.

This was an action to recover interest on money held by an administrator. Thornton died in —, leaving unknown, non-resident heirs.

LEMMON, J.

Court held that the weight of authorities in the United States does not warrant charging an administrator with interest unless it is shown that the money was used by him, that he obtained interest on it or valuable use of it or that he held it such a length of time as would make it inequitable not to allow interest on it. But that it is competent for the legislature to provide regulations governing such matters and that by sec. 6191, Rev. Stat., which appears to be a legislative regulation looking toward the employment of funds in care of an administrator, it is provided that if any sum of money shall remain in the administrator's hands for six months he may apply for an order of the probate court permitting him to invest such funds for the benefit of the heirs. It did not appear that any order was made regarding the investment of funds in this case or that any such order was asked for by the administrator. It did appear, however, that there was no reason for holding the funds unemployed, because the administrator's account filed appears to have been a complete, final account and nothing remained for him to do but turn the property over to the heirs.

They were not here and the evidence did not show what was done in reference to finding them other than a charge of ten dollars for such services. Court held that after the administrator made his final report showing nothing necessary to be done except to make a settlement with the heirs the balance due them should have been invested for their benefit.

There was no evidence that the administrator ever received any benefit from or interest on the money. He kept it in his bank account with his own funds. Court held that under the statute referred to money should have been put at interest or that the administrator should have at least called the attention of the probate court to it. That the word "may," as used in the statute, meant must, and imposed upon the administrator the duty of investing the funds. Ordered that administrator be charged with interest on balance in his hands.

CONTRACT OF SALE.

[Lucas Common Pleas.]

DAVIS V. PARKER.

1. It is competent for the parties in a contract of sale to settle between themselves the time when the property should vest in the purchaser, and it is competent to inquire what the parties intended.
2. When the terms of a sale of specific goods are agreed upon, and the bargain is struck and everything which the seller has to do with the goods to complete the contract, the sale becomes, in general, perfect, and the property remains at the risk of the buyer. The parties by their agreement and understanding fix the time when the property is to become the property of the purchaser; and, therefore, the rule above stated is a rule of construction only when no understanding or agreement has been prepared.

LEMMON, J.

This was an action to recover \$1,000 paid as part of purchase price on property destroyed by the falling of the Wheeler Opera House wall and the subsequent conflagration. Davis and Parker had entered into a contract, the first paragraph of which provided that Parker should sell to Davis all fixtures, including horses and wagons, used in his grocery and meat market business, for \$1,415—of which the latter had paid \$1,000.

The following paragraph of the contract was in relation to a sale of the stock and contained the provision that if, upon inventory, the total amount, including the sum for which the fixtures were sold, did not exceed \$3,000, Davis should pay cash. If the amount exceeded \$3,000, the balance should be secured by mortgage.

The issue between plaintiff and defendant involved the question whether property which was the subject of contract between the parties had, before same was injured or destroyed, become the property of plaintiff or remained the property of defendant.

The plaintiff claimed that it had not become his property, and that the transaction involving the contemplated purchase by plaintiff had not been completed. That parties intended to do and perform many other matters before it should be turned over to plaintiff.

On the contrary, defendant claimed that the contract had force and effect to convey and put over to plaintiff the title and ownership of the property described in the first paragraph of the contract, and that the remainder of property described in the contract became the property of plaintiff by force and effect of the contract upon the completion of the inventory. That the inventory was completed on the nineteenth (the fire was on the evening of the twentieth) and that the ownership of the property had become vested in Davis, but that Parker had the right to retain possession until the money was paid. That the agreement for a sale of the fixtures and the agreement for a sale of the stock were separate and distinct contracts.

This the plaintiff denied, and claimed that the contract constituted one indivisible contract, and that no portion of the property became plaintiff's until all matters of contract had been adjusted. That parties

Davis v. Parker.

were to have met on the morning after the fire to complete the purchase and that the destruction of the property intervened and prevented a completion of the contract.

Evidence indicated that Parker immediately after the fire understood the loss would fall on him and that while the inventory had been completed parties were to have met on the morning after the fire to complete the transactions. Parker filed proof of loss with one insurance company claiming the stock belonged to him absolutely and with another company for loss on fixtures, alleging that he was the owner subject to such rights as were acquired by Davis under the contract which was set forth.

Judge Lemmon charged the jury, in substance, as follows:

The contract between plaintiff and defendant is not two different contracts but one indivisible contract. It contemplates a sale and purchase of all property belonging to the business and when any became the plaintiff's property it all became so. There was a modification of the written contract by oral agreements relative to the amount of stock. It was competent for the parties to settle between them when the property should vest in the purchaser and it is competent, in determining that time, to inquire what the parties intended. "We say to you that when the terms of a sale of specific goods are agreed upon and the bargain is struck and everything which the seller has to do with the goods to complete the contract the sale becomes in general, perfect and the property at the risk of the buyer. It must be remembered, however, that the parties by their agreement and understanding fix the time when the property is to become the property of the purchaser and that the rule above stated is a rule of construction only when no understanding or agreement has been prepared."

If oral agreement had been entered into concerning the stock and the amount to be sold and purchased, terms of payment, etc., it became competent for the jury to inquire what was the contract or the intention and understanding of the parties. In determining this the jury might, the court said, consider the acts of the parties prior to, at the time and after the accident. If they found the fact to be that the written contract contained all the agreements of the parties and that the defendant had performed all the conditions of the contract and simply held the property awaiting the plaintiffs performance of his contract the verdict must be for the defendant.

Verdict for plaintiff \$1,048.50.

PAYMENT.

[Lucas Common Pleas.]

KESTING V. DONOHUE.

An unauthorized payment to a contractor, by a loan company out of money borrowed for building purposes, must be made good by such loan company.

This was a case involving the rights of mortgagees and claimants under mechanics liens, the principal question was as to payment by a loan company of money borrowed for building purposes. The defendant,

Mrs. Donohue, had contracted for a loan of \$2,200 to be advanced to the contractor and expended under her direction, or her husband's, acting as her agent.

HARMON, J.

Certain payments were made and at the time when the third became due the contractor had become embarrassed. In order to enable him to go on with the building Donohue told the loan company to advance money necessary to do so. Subsequently, finding that the work was not being done, Donohue notified the loan company to pay no more money to the contractor. Evidence indicated that immediately after Donohue directed the secretary of the loan company to pay money to the contractor, the latter went to the Western Manufacturing Company and agreed to turn \$600 of the \$800 still coming to him over to them in settlement of an account, not for supplies to go on with the building but in settlement of account for supplies already received. The Western Manufacturing Company verified his statement concerning money due from the loan company, and secured from its secretary a promise to turn it over to them, which was subsequently done.

Held that this was without authority of Mrs. Donohue or her agent, and that the loan company had no authority to apply the money without same; that the payment therefore did not apply on the loan, and that the loan company must make good the amount paid to the Western Manufacturing Company for distribution among present lienholders.

Delay in completing the building, delay in making the payments, court held that one offset the other.

JUDGMENT.

[Lucas Common Pleas.]

KOPF V. DENNING.

A judgment obtained before a justice of the peace which has become dormant, cannot be revived by filing a transcript in the court of common pleas.

HARMON, J.

The petition in this case states that plaintiff obtained judgment against defendant before a justice of the peace in 1876. Execution immediately issued and was returned unsatisfied. In May, 1893, transcript from the docket of the justice was obtained and filed in the clerk's office of this court. Petition filed on May 29, 1893, states amount of judgment and costs, and that it is wholly unpaid, and prays to revive the judgment and for "all proper relief."

A summons was issued and endorsed "action to revive dormant judgment and for money only." Defendant answered, and case was submitted to the court, witnesses sworn and testified.

The court held that the judgment could not be revived but that on the allegations contained in the petition and under the prayer for "all proper relief," plaintiff might have judgment against defendant for the amount of the judgment before the justice, and costs, with interest from June 13, 1876, the day when the judgment was entered on the docket of the justice of the peace.

NEGLIGENCE.

[Lucas Common Pleas.]

KRASINSKI V. MICH. CENTRAL R. R. Co.

Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train, and the omission to do so, without a reasonable excuse, therefor, is negligence, and will defeat an action by such person for an injury to which such negligence contributed.

Personal injury suit—Motion to arrest case from jury at close of plaintiff's testimony.

Krasinski, a teamster, was injured at Michigan Central crossing, Wagon Works. Evidence indicated that lumber was piled on each side of the roadway; on the right hand side there was a space of sixteen to twenty feet from the westerly rail of the main track to the lumber pile; on the left lumber was also piled, but evidence did not indicate the distance from the track.

The evidence showed that Krasinski was driving along slowly and as he approached the track he looked to the left, but not to the right. His testimony was to the effect that he looked to the north (his left) and before he could look to the south he was struck by a train from that direction. The evidence indicated, however, that he had ample time to do so for his horse had crossed the track and was not injured in the accident.

HARMON, J.

Although the evidence indicated that the train was running at a high rate of speed, and approached the crossing without warning, the court held that the law as laid down in Penn. Co. v. Rathgeb, 32 O. S., 66, was applicable to the present case.

In that decision the Supreme Court held that "ordinary prudence, requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train; and the omission to do so, without reasonable excuse therefor, is negligence, and will defeat an action by such person for an injury to which such negligence contributed.

Court directed and jury found a verdict for defendant.

APPEAL BOND.

[Lucas Common Pleas.]

***GEIRL V. METROPOLITAN LIFE INS. CO.**

An appeal will not be quashed, because the appeal bond is signed by a bank which has no authority to bind itself.

HARMON, J.

It was contended that the bank had no authority to bind itself. Court held that while this was undoubtedly true it was not sufficient ground for quashing an appeal, but that party might be required to give additional bond; motion overruled.

MARRIED WOMAN.

[Lucas Common Pleas.]

PAUL RAYMOND V. HENRY C. BRECKENRIDGE ET AL.

In an action upon a judgment rendered against a married woman as member of a co-partnership; Held, that nothing could be claimed as against her from the obligation and effect of a judgment against her, other than that it bound her separate estate then owned by her, and hence when such separate estate was wholly exhausted in proceedings enforcing such judgment, farther remedy against her could not be had.

MOTION to strike out second defense of Julia S. Manahan because the same is irrelevant and redundant.

LEMMON, J.

The petition counts upon a judgment heretofore rendered in the court of common pleas of Lucas county at the April term, A. D. 1879, in favor of plaintiff and against each of the defendants and the petition proceeds to aver certain payments made on said judgment—the amount that still remains due and unpaid thereon and asks that plaintiff may recover thereon the amount so remaining unpaid against each and every of the defendants.

The defendant, Julia S. Manahan, files a separate answer to the action; and for a second defense she avers that she was a married woman and as such was a member of a co-partnership with the other defendants engaged in carrying on a hardware business in Lucas county, O., under the firm name of Breckenridge & Co.; that said co-partnership in conducting its said business became indebted to plaintiff and gave to plaintiff promissory notes to secure such indebtedness; that she at no time took any active part in the business of said firm; that she did not sign said notes or have any knowledge of their existence or the existence of such indebtedness until after the bringing of such action and that at no time did she have any intention to charge her separate estate with the

*The judgment in this case was affirmed by the circuit court. See opinion 9 O. C. D., 182. The judgment in the circuit court was affirmed by the Supreme Court, without report, January 4, 1898. Judge Shauck dissenting. 57 O. S., 671.

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payment of said debts and that she had no separate property or estate except her interest in said co-partnership; that all of the property of said firm was sold under the orders of this court procured by plaintiff and the proceeds thereof was appropriated toward the payment of plaintiff's judgment and she says that by such sale her separate estate and all property which she then owned was used in paying plaintiff's claim and that she is not now and has not since been the owner of any separate estate or property.

Plaintiff, in support of his motion to strike out claims that these matters are irrelevant and redundant because, he alleges, that if such matters constitute a defense to plaintiff's action they might have been set up in said former action and that because they were not, defendant Manahan must be held to have waived such defense: and that the judgment of this court rendered at the April term, 1879, must be held against each defendant conclusive as to matters then adjudicated and all matters which defendants might have presented for adjudication.

In answer to this it was said that the judgment in this case was not a personal judgment as against defendant Manahan but a judgment as to her against her separate estate in said co-partnership and the case of *Avery v. Vansickle*, 35 O. S., 270, 273 and 275, is relied upon as sustaining such position.

The motion to strike out the second defense from the separate answer of Mrs. Manahan is overruled.

The case of *Avery v. Vansickle*, supra, was decided after the statute of March 30, 1874, authorizing actions by and against married women was in force. That statute has been in force substantially in terms as it now reads during the proceedings referred to in the pleadings of the parties hereto, sec. 5319, Rev. Stat., which contains the statute of March 30, 1874 reads as follows: "When a married woman sues or is sued like proceedings shall be had and judgment rendered and enforced as if she were unmarried, and her property and estate shall be liable for the judgment against her, but she shall be entitled to the benefits of all exemptions of heads of families."

The act of 1874, page 47, says that where a married woman is "engaged as owner or partner in any mercantile or other business and the cause of action grows out of, or concerns such business, she may sue or be sued alone. And in all cases where she may sue or be sued alone the like proceedings shall be had and the like judgment rendered and enforced in all respects as if she were an unmarried woman, and in every such case her separate property and estate shall be liable for any judgment rendered therein against her, to the same extent as would the property of her husband were the judgment rendered against him."

Notwithstanding the at first sight sweeping clauses of these statutes the Supreme Court in *Avery v. Vansickle*, supra, says on page 273, "In the case of *Allison v. Porter*, 29 O. S., 136, it was held that the statute last above set forth did not create a new cause of action in favor of, or against a married woman where none existed before, but that the statute as amended was intended to prescribe the cases in which she may sue or be sued alone, authorizing in such suits like proceedings and judgments, and like enforcement in all respects as if she were sole." * * *

"Before a judgment can be taken against her on her promissory note, it must appear that she had a separate estate to charge with its payment and that she intended to so charge it at the time she executed the note—and they add these questions are clearly for the court."

Lucas Common Pleas.

On page 278, "It is true that the note in form is joint, and a judgment upon it were the plaintiff discover and consequently liable thereon at law, would within the authorities, constitute a complete bar to a subsequent action thereon. A joint obligation where the obligors are all bound at law creates but one debt, and where a judgment is entered upon, it whether against all or only a part of the obligors all further remedy is merged in the higher security.

On page 275, "But in the present case the makers of the note were not in a legal sense jointly liable thereon. No obligation was created against the wife which could be enforced at law, hence a joint remedy could not have been anticipated when the note was executed. * * *

"The husband was alone liable on the note, or he was liable jointly with the wife's separate estate against which the remedy was wholly in equity while the liability was strictly legal."

Following the line of thought thus put forth by the Supreme Court, it would seem that nothing could be claimed as against a married woman from the obligation and effect of a judgment against her other than that it bound her separate estate, then owned by her, and hence when such separate estate was wholly exhausted in proceedings enforcing such judgment farther remedy against her could not be had.

EVIDENCE.

[Lucas Common Pleas.]

STATE V. FLAVEL ET AL.

Where a burglar's outfit is found in the possession of a criminal, this fact constitutes evidence which may indicate a combination of criminals from which the jury are to determine whether or not one of the defendants was an accomplice of another.

James Flavel, known as "The Rat," James Proctor and a man named Jackson were arrested on a Michigan Central train just entering Toledo. Flavel and Proctor are notorious criminals. The former pleaded guilty and Proctor entered a plea of not guilty.

On his trial, for having burglars tools in his possession, after testimony for the state was concluded, defendant's attorney moved to arrest the case from the jury on the ground that there was no evidence showing or tending to show that the defendant had any thing to do with the burglars tools or was in any way connected with Flavel at the time of his arrest.

LEMMON, J.

The evidence indicated that Flavel, Proctor, the defendant, and Jackson boarded the train for Toledo at the same station; that Flavel entered the car and took a seat on one side of the car, toward the forward end; that he carried on his shoulder the valise containing the burglars tools and placed the same in the rack over the seat he occupied. Proctor, the defendant, followed Flavel into the car but took a seat on the opposite side of the car, nearer the center. Jackson followed and took a seat next in rear of the one occupied by Flavel.

The evidence also showed that Flavel and Proctor had been companions at other times and other places; that they were seen together once or twice in disreputable houses.

The burglars tools, including safe blowing tools, constitute an outfit

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which would require a combination of individuals to handle in the work which the tools were intended to perform.

Held by the court, That without going further into the evidence there appeared to be enough to warrant allowing the jury to determine whether or not the defendant was an accomplice of Flavel's.

Motion overruled.

(The defendant then withdrew his plea of not guilty and pleaded guilty.)

EVIDENCE—NEGLIGENCE.

[Lucas Common Pleas.]

JOS. A. BAUMGARDNER V. TOLEDO ELEC. ST. RY. CO.

In an action against a street railroad company to recover for the death of a valuable dog: Evidence that a car was going pretty fast or very fast, does not tend to prove that the car was being driven at an unlawful, negligent or dangerous rate of speed.

HARMON, J.

The petition alleges that plaintiff was the owner of a valuable dog; that the dog had strayed from the place where he was kept; that he got out without the fault or negligence of plaintiff and was on Bancroft street, a short distance east of where Putnam street crosses said Bancroft street, when defendant's car approached from the east at a high and dangerous rate of speed; that defendant's employees in charge of said car gave no attention to said dog; gave no alarm; that they did not check the speed of the car at all, but ran it so rapidly, carelessly and negligently that it struck the dog and killed him.

The proof showed that the dog was a thoroughbred Llewellyn setter. The plaintiff's evidence also showed that as the car approached the dog was lying on the north side of Bancroft street about four or five feet south of the curbstone, between the curbstone and the north rail of the street car track. One witness swore that the car was going pretty fast; another that it was going very fast. As the car approached, the dog started to go south across the track and was struck by the car and carried nearly to the middle of the next square when some one in the street called the attention of the men on the car to the dog, when they stopped the car and the dog was taken out dead.

When plaintiff closed his case defendant's attorney moved the court to direct the jury to return a verdict for defendant.

The court held, that the evidence that the car was going pretty fast or very fast did not tend to prove that the car was being driven at an unlawful, negligent or dangerous rate of speed and that there was no evidence tending to prove negligence on the part of defendant's employees in the management of the car.

Motion granted and jury directed to return a verdict for defendants.

USURY.

[Lucas Common Pleas.]

OMAHA LOAN AND TRUST CO. V. BELLEW.

The usury laws of another state will be upheld in an action in this state upon an obligation executed in such state.

Action to recover balance claimed on bond or obligation entered into by defendant with Omaha Loan & Trust Co. Trial to a Jury.

Petition set out amount, about \$640, which plaintiff claimed as balance due on the bond. Defendant answered, admitting the making of the obligation but averring that whilst the bond acknowledged the receipt of \$2,000 defendant at the same time paid to plaintiff \$150 cash. This was denied by plaintiff.

LEMMON, J.

The court instructed the jury that the laws of Nebraska, it being also admitted by counsel, were necessarily a part of the contract and that as under the laws of that state persons borrowing money are permitted to enter into contracts for the payment of ten per cent. interest the verdict must be determined by the finding of fact relative to payment of the \$150 bonus or commission. If they found from the testimony that defendant did not pay to plaintiff, or any one for it, plaintiff should be given a verdict for the full amount of its claim. If, on the contrary, they found the fact to be that defendant paid said sum to the plaintiff or any person for plaintiff, their verdict should be for the defendant, as, under the law of Nebraska, where contracts for more than ten per cent. interest are made a penalty is inflicted upon the party seeking to enforce such contracts to the extent of denying him the right to recover any interest whatever and it was conceded by counsel that if no interest was allowed there would be nothing due from defendant to plaintiff.

Verdict for defendant.

INSTALLMENT GOODS.

SHERMAN JEFFRIES V. DRAPER & NUGENT.

I purchased installment goods and before they were paid for desired to move them to Indiana. Seller refused to permit and property was delivered to him to hold until paid for. He held it one year without receiving balance and subsequently sold it. First purchaser brought suit to recover amount paid: Justice gave judgment for defendant. The record showed the facts stated but did not contain all the evidence: *Held*, there was no manifest error in the record.

ERROR from Justice Court.

HARMON, J.

Action involving contract for sale of goods on the installment plan, written agreement amounting to a mortgage. Statute regulating such contracts provides that seller cannot take back goods except by refunding the amount paid less a reasonable amount for the use of the goods, not exceeding fifty per cent. of the amount paid. In the case the party bought goods and had paid about half the purchase price of \$70 when he wanted to move the goods away into Indiana. Seller refused to permit it and the goods were delivered to him to hold until purchaser should send for them. In about one year the latter wrote requesting the goods sent but without remitting the balance due. Subsequently the goods were sold to another party. First purchaser then brought suit to recover the amount paid on the goods. Justice rendered judgment for the defendant.

Jeffries v. Draper & Nugent.

Exceptions were filed. The record indicated the facts stated but did not contain all the evidence. The court held there was no manifest error in the record and the petition in error was dismissed.

FIRE INSURANCE—PLEADING.

[Lucas Common Pleas, April Term, 1894.]

BOEHM V. CENTRAL OHIO INSURANCE CO.

In an action on a policy of insurance which contains a provision that the policy shall become void if the insured procured any other insurance on the property covered by the policy, unless permission in writing for such other insurance shall be endorsed on said policy. Defendant, in his answer sets forth this provision, claiming that the insured had procured such other insurance without having obtained such permission. Plaintiff replied, and admitted the allegations in the answer, but alleged that such insurance, so procured, was within the knowledge of the company: Held, that the allegation of waiver in the reply was sufficient to defeat a motion for judgment on the pleadings.

Action to recover on a policy of fire insurance. Motion by defendant for a judgment on pleadings.

M. G. Bloch, for plaintiff.

Chittenden & Chittenden, for defendant.

LEMMON, J.

The petition is upon a policy of fire insurance. The answer sets forth one of the conditions of the policy which is, in substance, that if the insured shall, at any time during the life of the policy, procure, or cause to be procured, any other insurance on the property covered by the policy, said policy shall be void unless permission in writing for such other insurance shall be endorsed on said policy. The answer alleges that additional insurance was obtained; that plaintiff entered into such contracts without the consent of the defendants.

To this answer the plaintiff replies, admitting that the policy contained the condition set forth in the answer and that plaintiff did procure other policies of insurance upon the same property, but alleges that said other insurance, so procured, was within the knowledge of the defendant company.

The attention of the court, upon the hearing of the motion, was directed to another condition of the policy, which declares that no officer or agent of the company shall have power to waive any condition of the policy unless the same shall be done by endorsement thereon.

Held by the court, The language of the reply is that said defendant company waived the provisions of said policy by a verbal agreement entered into between plaintiff and one H. C. Miley, general agent of said company.

The company certainly had power to waive or modify the conditions of its policy and the allegation is that it did so. It, therefore, becomes a matter of proof and incumbent upon the plaintiff to establish that the company waived the condition referred to. If the allegation had been that the agent waived the condition of said policy the motion would be granted, but the allegation is so broad that the court is prevented from granting the defendant's motion.

Motion overruled.

PLEADING.

[Lucas Common Pleas, 1894.]

JONTE V. TOLEDO FOUNDRY AND MACHINE CO..

In an action on a warranty alleging certain defects in a machine, such allegations must be specific.

Motion to make petition more definite. Plaintiff brought suit on the warranty of an excavator, alleging that the machine was defective. A second cause of action was to recover money expended in repairing it.

HARMON, J.

Court held that the petition should state specifically what the defects were and also indicate specifically what repairing was done; motion granted.

SEWER ASSESSMENTS.

[Lucas Common Pleas, 1894.]

MILLER V. TOLEDO (CITY).

Where a lot is already provided with sewer drainage, the owner cannot be assessed for another sewer.

This was an action to enjoin the collection of a sewer assessment.

HARMON, J.

An original lot, afterwards subdivided, abutted on an alley in which a sewer had been constructed. Plaintiff owning one of the subdivisions had paid a proportion assessed against the whole of the original lot and had constructed a drain pipe into said sewer.

Subsequently the city proceeded to construct a sewer running at right angles with the first one and in the rear of the subdivisions of the original lot. In doing so, it tore up plaintiff's drain and assessed about \$85 as plaintiff's proportion of the costs of the last sewer. It was held by the court that plaintiff had drainage already and could not be assessed for another sewer.

Injunction allowed.

DOWER.

[Lucas Common Pleas, April Term, 1894.]

***BAUSCH V. MCCUNNELL ET AL.**

A conveyance of an unassigned dower interest, for a valuable consideration, will be sustained in equity.

Action by a creditor of McCunnell's against McCunnell and Taylor to subject interest of McCunnell in the real estate of his deceased wife

*For opinion of circuit court in this case, see 7 O. C. D., 547.

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to the payment of a judgment heretofore obtained by plaintiff against McCunnell.

K. A. Flickinger, for plaintiff.

Pratt and Wilson, for defendant.

HARMON, J.

Taylor's wife was the only surviving child of McCunnell and his deceased wife. McCunnell's interest in his deceased wife's real estate was never set out and assigned to him, but about one month before plaintiff's judgment was obtained, McCunnell made a conveyance to Taylor of all his interest in his deceased wife's real estate, and plaintiff claimed that McCunnell could not transfer any interest in his deceased wife's real estate until after it was set out and assigned to him.

The court held, that in equity, for a valuable consideration, the conveyance by McCunnell to Taylor of his interest in his deceased wife's real estate was effective, and passed to Taylor all the interest that he had.

Plaintiff's petition dismissed.

PARTIES.

[Lucas Common Pleas, 1894.]

ZEIGLER V. ASHLEY ET AL.

The city and persons responsible for an unguarded excavation in a street, cannot be joined as codefendants in an action for resulting injuries.

LEMMON, J.

Plaintiff alleged in his petition that defendants Bentley and Ashley were, on October 19, 1892, constructing a large building on the corner of Jefferson and Michigan streets; (The Monticello) that in the construction of said building, and prior to said date, said defendants had caused an excavation to be dug extending into said Jefferson street; that while it was the duty of said defendants to guard said excavation they were negligent in this regard and that plaintiff, while walking along said street on the night of said day, fell into said excavation and suffered the damages for which he seeks compensation.

The negligence charged against the city was that it knowingly permitted said excavation to be and remain without sufficient guards to protect the public.

The city, having obtained leave of the court to withdraw its answer and to file a special demurrer, demurred to said petition for the reason that separate causes of action against several defendants were improperly joined.

This demurrer was sustained by the court upon the ground that the city not having created the danger could not be liable in this cause without actual notice of the dangerous condition of said excavation or unless it had existed for such length of time prior to the accident as to charge it with constructive notice thereof; and on the ground that this constituted a separate cause of action against the city because the

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negligence of its codefendants was in not sufficiently protecting the public against a danger they had created.

It was further claimed by counsel for the city that the action being joint the judgment, if rendered against defendants, must be joined and that if the city was required to pay the judgment there could not be that contribution or indemnity which the law gives a municipality in cases where it has been required to pay damages resulting from the negligence of third parties.

This claim was also sustained by the court.

James E. Pilliod and F. E. Wright, for plaintiff.

Charles F. Watts and Julian H. Tyler, for the city.

Swayne, Swayne, Hayes and Tyler, C. S. Ashley and Alex L. Smith, for other defendants.

STREET ASSESSMENTS.

[Lucas Common Pleas, April Term, 1894].

DAIBER V. TOLEDO (CITY).

A barn having been built on the rear of the lot, and actually fronting the house, which fronted on another street, does not make a foot frontage, though it has an entrance from a side street. The use of a street may be merely incidental, so as not to create a frontage of a corner lot as to a side street.

Property corner of Jefferson and Eighteenth street. The lot was platted to front 100 ft. on Jefferson street and abutted 160 feet on Eighteenth street. The house was built fronting on Jefferson street. A barn on the rear end of the lot had an entrance from Eighteenth street.

HARMON, J.

Defendant urged that while a portion of the assessment for 160 feet on Eighteenth street might be illegal it was valid for the number of feet occupied by the barn; that such occupancy of the rear of the lot made a front footage of so many feet on Eighteenth street.

The court held, that the barn having been built actually fronting the house, which fronted on Jefferson street, the use of Eighteenth street was merely incidental to an occupancy of the premises with reference to the frontage on Jefferson street.

C. H. Lemmon, for plaintiff.

Horace Merrill, assistant city solicitor, for defendant.

STREET ASSESSMENT.

[Lucas Common Pleas, April Term, 1894.]

BENTLEY V. TOLEDO (CITY).

If a lot abuts lengthwise on the improvement, but fronts breadthwise on another street and not on the improvement, the lot should be deemed as fronting breadthwise on the improvement, and be assessed for the number of feet on the improvement that it would have in such case, and no more.

Suit to enjoin the collection of an assessment for the improvement of Fourteenth street by paving.

HARMON, J.

The lot in question abuts 110 feet on Fourteenth street and 67 feet on Adams street. It is occupied by two houses, both fronting on Adams street, and each house occupying a frontage of $33\frac{1}{2}$ feet on Adams street of the lot extending back 110 feet at a uniform width. The assessment was made by the front foot and for 110 feet on Fourteenth street.

The court held the principle of the rule of assessment as laid down by the Supreme Court in *Haviland v. Columbus*, 50 O. S., 471 is that an improvement on a certain street benefits the property on it in proportion to the frontage of each lot; applying that rule to this case only that part of the lot occupied by the house on the corner of Adams and Fourteenth street is benefited by the improvement and that part has a frontage $33\frac{1}{2}$ feet, so that this lot can only be assessed for $33\frac{1}{2}$ feet front and not for 110 feet.

C. H. Lemmon and Geo. P. Kirby, for plaintiff.

C. F. Watts and Horace Merrill, city solicitors, for defendant.

RAPE—EVIDENCE.

[Lucas Common Pleas, April Term, 1899.]

RYAN V. SAYEN.

In an action for damages for an assault with intent to commit a rape, evidence that the accused is reputed as a peaceable and quiet citizen is not admissible.

Action for damages for assault with intent to commit a rape.

HARMON, J.

Plaintiff, a woman, charges defendant with making an assault upon her with intent to commit a rape and defendant sought, in the trial by jury, to show his good reputation as a peaceable and quiet citizen. Objection to receiving the evidence sustained. Verdict for plaintiff.

EQUITY—RECEIVERS.

[Cincinnati Superior Court, Special Term, June 18, 1904.]

DOANE V. DONOUGH.

The usages of courts of equity, as to the manner of appointing a receiver, where it is not otherwise provided by statute, is applicable to cases arising under the code; and, therefore, in an action to sell a leasehold for non-payment of rent, the court has power to appoint a provisional receiver for the rents.

HUNT, J.

The court held that the usages of courts of equity as to the manner of appointing a receiver, where it is not otherwise provided by statute, is applicable to cases arising under the code. This is an action to sell a leasehold estate for the non-payment of rent, to secure which a lien was reserved. The rent is payable quarterly, and there is a balance due on the September payment, as well as a default for the full installments payable in December and March following.

It was the contention of defendant that no power existed in the court under sec. 5587, Rev. Stat., to appoint a receiver, inasmuch as this was not one of the cases enumerated under this section.

Paragraph 6 of this section vests in the court the power to appoint a receiver "in all other cases where receivers have heretofore been appointed by the usages of equity."

The court, following the case of *Railroad Co. v. Sloan*, 31 O. S., 1, 7, decided that a provisional receivership is something more stringent than even an injunction. It should only be granted in cases of apparent necessity. It is an equitable remedy, and stands in a similar relation to courts of equity that proceedings bear to courts of law.

To deny a receiver in this case would be to cast upon the plaintiff the whole hazard of a situation caused by the default of the defendant, and, in effect, would permit the defendant to profit by every delay that might be interposed to the progress of the case.

Motion granted.

Bateman & Harper, for motion.

Chas. J. Hunt, contra.

CONSTITUTIONAL LAW.

[Lucas Common Pleas.]

HOLTGREIVE V. OHIO.

The act to prevent deception in the sale of dairy products and to preserve the public health (88 O. L., 51), is constitutional.

LEMMON, J.

This case is here on error to the docket of a justice of the peace, in which this court was asked to find that the law of 1890 (88 O. L., 51), entitled an act to prevent deception in the sale of dairy products and to preserve the public health was unconstitutional.

After an examination of the record and proceedings before the justice, the court found there was no error, thus holding that the law in question is constitutional.

JURISDICTION.

[Hamilton Common Pleas, 1894.]

GRAHAM LUMBER CO. ET AL. V. JULIEN ET AL.

The probate court has exclusive jurisdiction for the determination of chattel mortgage liens, and assignment matters.

BUCHWALTER, J.

The petition avers that the plaintiffs are general creditors of the Madison Planing Mill Company; that the defendant, Julien, claims a lien upon certain chattel property for \$620; that said chattels are now in the custody and possession of the assignee, Rodman, for the purposes of the assignment according to the insolvent laws of Ohio. Various reasons pertaining to the manner and conditions of the execution of the chattel mortgage to Bertha Julien are set out, wherein it is claimed that said lien is not valid, and should not be allowed by the said assignee as such.

Plaintiffs pray for a finding accordingly; as to said chattel mortgage, that said assignee be restrained from allowing till the termination of the suit, and other relief.

A number of other like actions are filed against various other chattel mortgagees, joined with the assignee, and demurrers have been filed for cause:

1. That this court has no jurisdiction of the subject-matter.
2. That other action is pending between the same parties for the same cause, to-wit: the assignment in the probate court.
3. Misjoinder of parties plaintiff.
4. General demurrer.

With my view of the issue as to jurisdiction, it becomes unnecessary to discuss the other grounds of demurrer.

Their first ground for demurrer calls for consideration of the scope of the jurisdiction acquired by the assignee in accepting the trust, and in qualifying and taking possession of the chattel property in accordance with the statutes regulating such assignments for the benefit of creditors.

It is not averred, and is not claimed, that any special proceeding as to either of these mortgages was taken in the probate court, nor is it negatived in the pleading, and the issue, therefore, is confined to the general jurisdiction in such proceedings in the probate court.

The allowance or disallowance of a claim is made by the assignee, subject, however, to contest on behalf of creditors, or the assignor; but the determination of the lien, and its allowance and payment out of the proceeds is solely upon the order of the probate judge—likewise the sale of chattel property upon its order. Has that court exclusive jurisdiction in that regard upon the facts here stated?

Such would seem to be the necessary logic and holding to arrive at the ultimate conclusion in *Lindemann v. Ingham*, 36 O. S., 1, and *Ingham v. Lindemann*, 37 O. S., 218. In *Simpson et al. v. Sayler*, assignee, Ohio Circ. Dec., 370, it was held that the probate court had jurisdiction against the protest of the creditors interested, and of the assignee, and the court, in their opinion, held that such court had exclusive jurisdic-

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tion, its judgment being subject to appeal, as in other matters of final determination therein.

A. M. Warner, for plaintiffs.

B. B. Dale, Oliver B. Jones, Wilby & Wald, attorneys for defendants.

ATTORNEY FEES.

[Lucas Common Pleas, July 7, 1894.]

GATES AND HUESTON V. TOLEDO (CITY).

In an action against the city on assessments which prove to be illegal or invalid the plaintiff is not entitled to recover counsel fees paid by him in such action.

The question of allowing the taxation of attorney fees, against the city, in cases where suits are brought on assessments which prove to be illegal or invalid, is among the subjects of recent adjudication in Toledo, and elsewhere in Ohio. Although the courts seem to have had different views on the subject, it may be said now that the weight of authority in Ohio is against allowing the collection of attorney fees in such cases. Not long ago Harmon, J., held in *Goulden v. City of Toledo*, that a reasonable allowance for counsel fees might be recovered. In that decision the court refers to the conflict of authorities in different states, but, it would seem, relied principally upon a decision of the superior court of Cincinnati, general term, by Force, J., which held that counsel fees might be allowed in the measure of damages for delivering an invalid assessment. More recently the circuit court of Hamilton in the case of the *City of Cincinnati v. Steadman*, 6 Ohio Circ. Dec., 380, held that it was error to include a charge for attorney fees in a judgment against the city of Cincinnati for the amount which plaintiff failed to recover on account of an invalid assessment. This latter ruling is now accepted here as the better doctrine as appears from the following decision, by Lemmon, J.

The present case also includes another phase of the question, being an action to recover attorney fees in a case where only a portion of the assessment was invalid.

LEMMON, J.

This is a demurrer to the petition; the petition stating, perhaps, all the necessary averments—with one or two shortages—of which, perhaps, I may remind counsel. The relation of the matter is a historical statement of the proceedings of the city council whereby they, under the statute in regard to sewers and drainage, laid off a sewer district and provided for certain main and lateral sewers. This is recapitulated and it is then stated that in pursuance of this plan of sewerage, the city advertised for bids upon certain work; and it specifies that bids were made and that a contract was entered into between the city and the plaintiff in this case—Gates, etc., and that they proceeded to construct the sewer in accordance with the plans and specifications adopted and approved by the city council through its various bodies; that this work was accepted by the city, etc., and that thereupon an assessment was made upon the property benefitted, according to benefits. The petition then proceeds to state the owners of the property and describes the property which they owned which was found to be benefitted by the drainage, and there is a long statement of these matters. It then pro-

ceeds to say that an assessment was made upon the property for the benefits which were found to have accrued to the property and been received by the property from this drainage and specifies the property and the amounts of the assessments. It alleges that these assessments, being unpaid—by the terms of the ordinance it was fixed that the payments should be made at such and such times, and from time to time—and it specifies that these payments not being made, suit was brought in the court of common pleas, and that a decree was made there, and from this decree an appeal was taken to the circuit court; and that, in the year 1889—I think—the circuit court heard the matter upon appeal and rendered a decision. And it specifies that decision. And right there there is an uncertainty, I think, as to the amount which was left unpaid to the contractors. The circuit court in fact found certain amounts valid assessments against these parties, some of them, and I remember no statement in the petition of the amount of assessments which were unpaid, but only the fact that there were assessments unpaid. We think it should be made more specific in that respect. I do not gather from the reading of it the certainty that should be there. It then finally states that for so much as is lost of this assessment the parties have been subject to expense, to-wit, for the hiring of counsel; and this action is brought wholly for the purpose of recovering an amount of some twelve hundred dollars which it is claimed has been expended in the hiring of counsel. There is no specification in the petition, that I have the least recollection of, as to these services being rendered wholly in the attempt to collect the uncollected portion of the assessment. Of course, whatever services rendered in the making of collections which were successful, you have no right to recover for. That would be conceded, I guess.

Mr. Brophy: If we had collected the whole of any assessment I would concede that.

The Court: We do not think you have a right to recover on this petition for any work by the hiring of counsel. We think it is manifest that it was in contemplation not only of the city but of the contractors, that they were to collect this and this is their expense. If they had been successful in collecting these you will concede that they would not have had any right to collect of the city the expenses which they had been put to. Well, now, they have been put to no greater expense because of their failure to collect them. They have now collected of the city. Presumably they have been paid by the city and they have been indemnified. They are getting the amounts of their assessments; they are getting the contract price in part from the property owners and in part from the city, and now, because they don't get it all from the property owners, they are seeking to get the money which they have been compelled to expend in the hiring of counsel. Counsel may have been necessary to be hired and expense undergone although every item was collectable. Parties owning property against whom assessments have been made, we may presume it was foreseen by both parties, that they might not be willing to pay and that these amounts would have to be collected. Now we do not think that, the fault of the parties, in any way attributable to the city—at least this petition don't show this, except perhaps, that the city had made a mistake in the supposition that this property needed these additional drainage facilities—I don't think, however, that it is a case in which it can be said that the city by contract have pledged themselves to pay for counsel fees, and I am quite unwilling, until it has been determined by a court that controls this, that such liability has been

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incurred on the part of the city, I am unable to hold that there is a liability on the part of the city. The question has been reached, it seems, in Cincinnati, and there the court of review held that it was error to include a charge for attorney's fees in a judgment against the city of Cincinnati for an assessment which they were unable to collect. The direct question was before that court, and we think that their decision was a correct one. While it is not, of course, clear, it is one of those first impressions that we get. I have given it all the thought that I could, and I am disposed to say that there is nothing here that in my judgment would warrant a judgment against the city upon the facts stated in the petition. The ruling, therefore, will be to sustain the demurrer to the petition.

Plaintiff excepted and took thirty days to file amended petition.

Stephen Brophy, for plaintiff.

C. F. Watts, city solicitor, for city.

ATTORNEY FEES.

[Lucas Probate Court, July 31, 1894.]

*TOLEDO (CITY) V. MICHAEL JACOBSON ET AL.

Attorney fees cannot be allowed in proceedings for a change of grade, where the city refuses to proceed.

The question of the right to recover attorney fees in proceedings for a change of grade, where the city refuses to proceed, was involved in this case. The decision was upon a motion to retax costs, overruled July 31, 1894. In thus disposing of the question the court said :
MILLARD, J.

Equitably, there is no question but what these attorney fees should be taxed against the city, and there is really more propriety in doing so in a change of grade case where the city refuses to proceed, than in an appropriation ; from the very nature of the thing, we have got to have a different class of expert evidence. We have got to have men pass upon the buildings, the most of whom are experts in their particular lines, and are entitled to receive, and the rule of the court has always been, greater compensation than is allowed simply to a witness in an appropriation proceeding, when he comes in to testify as to the value of the lands. But what troubles me here is the wording of this statute.

Section 2260, Rev. Stat., says: "When a municipal corporation makes an appropriation of land for any purpose specified in this chapter, and fails to pay for or take possession of the same," then all these other things follow. Now, while the easement in a street is property, yet it is not land. It is an invisible something that goes with the land, but the land itself is not taken, and it is only the mode of access to the land that is changed, and that mode of access is property. But it occurs to me that it is not a class of property that is covered by this opening sentence here, that "When a municipal corporation makes an appropriation of land for any purpose specified in this chapter." And

*See opinion of circuit court in this case, 5 Ohio Circ. Dec., 137, which overrules this.

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with this sec. 2316, Rev. Stat., which provides that "If the council decide to proceed therewith, an ordinance for the purpose shall be passed; and where provision as to damage is not made in this chapter, the provisions in chapter 3 of this division shall apply to the proceedings, so far as they are applicable."

The damage that is referred to in this section is not what expense the property holder may be put to, I think, but it is the compensation, or method of compensation, for the thing taken; and while I have not seen any way that I could get around that, I am free to confess, that the court is very much inclined to override the little omission of the legislature to make the proper appropriation for this particular class of cases, and hold that the city should pay. It does seem to me, taking the statutes as they stand now, that the legislature has simply omitted in sec. 2316, Rev. Stat., at the time they were passing the amendment, to take into account the other class of proceedings, and make a provision for them.

Mr. Cummings: My idea was that the legislature, in making that provision, had intended it to apply to all the proceedings for a change of grade; and where there was any omission, that the court, for information as to what had to be done in these proceedings, should go to chapter 3 and be governed by that.

The Court: If there is anything in chapter 3—

"When a municipal corporation makes an appropriation of land for any purpose specified in this chapter, and fails to pay for or take possession of the same within six months after the assessment of compensation shall have been made * * * upon motion of any defendant said costs shall thereupon be retaxed, and a reasonable attorney's fee, to be paid to the attorney of such defendant, together with any other reasonable and proper expense incurred by defendant."

I cannot help but think that the legislature made a mistake, because the appropriation of land is so simple. This case is a most excellent illustration of the injustice of not allowing attorney's fees. Here were sundry parties employing expert workmen to estimate their damages and hired counsel. But as the law now stands, I can't see my way clear to allow the motion.

J. W. Cummings, for motion.

C. F. Watts, city solicitor, against.

STREET ASSESSMENTS.

[Lucas Common Pleas, July 10, 1894.]

TOLEDO (CITY) v. JOSEPH H. AINSWORTH ET AL.

When the council adopts one of the modes of assessment, as provided for by sec. 2264, Rev. Stat., the court has no power to substitute another mode of assessment.

HARMON, J.

This case of the city of Toledo for the use of certain parties, against Joseph H. Ainsworth and others, was heard last week, and we will dispose of it now.

A petition was filed in this case, and it is alleged in the petition that the city of Toledo is a corporation organized under the laws of Ohio—a

city of third grade and first class. It alleges that the city of Toledo on May 1, 1892, passed an ordinance to improve Front street from the westerly line of Oak street to the westerly line of ——— street, grading the same the entire width, with drainage, etc., in accordance with the profile on file in the city engineer's office, and due notice was given to owners of property abutting on the said street.

On July 4, 1892, the city council passed an ordinance for the making of this improvement and the resolutions to assess upon the lots abutting on the improvement according to the foot front, and that the assessment should be made in accordance, one-half payable in 10 days and the balance, or remainder, one year thereafter. And in default of payment should be subject to penalty and interest to the contractor doing the work. This ordinance was approved and published twice in a daily newspaper of general circulation in the city. Therefore the city clerk published the same for bids, and bids were filed and opened as provided by the statutes, and W. T. Ryan being the lowest bidder, his bid was accepted by the city according to the resolution and ordinance. The contract was made on September 12, 1892. And it is also alleged that Ryan assigned his contract to Edward W. Rhodes, trustee, and he completed it in accordance with the contract, which was accepted by the city engineer, and after the acceptance of the contract in September, 1892, the city council by an ordinance duly passed, made an assessment and levied and assessed per foot front on lots bounding and abutting the sum of \$3.5804. This assessment was assigned by Ed W. Rhodes, trustee, of Ryan, and payment was ordered to be made, one-half in ten days and the balance in one year. This ordinance was duly published according to law. The petition sets forth that the owners of the different lots abutting and bounding on this improvement were assessed to pay the expense of the same. These are in Cornwalls addition, and they are numbered in that addition from 18 to 31 inclusive. The petition sets forth the exact amount assessed upon the interest of each owner of these lots. It says that the interest in this assessment has been sold and transferred to MacGahan & Co., who are the owners of it now.

There are numerous owners in these lots who have filed answers in this cause. The answers are somewhat various; some of them general denials; others allege that this assessment is excessive, exceeding the amount allowed by law to be assessed on these lots. But the statutes limit the power of assessment to 25 per cent. of the actual value of the lots after making the improvement, and other defences are made alleging that the assessment is excessive, by reason of the lots not having a frontage at all upon the street; others that the front of the line of the lots on the street is much longer than it is equitable that an assessment should be made upon, and that the assessment should be adopted in part. Though that language is not used, that is the claim.

Without going into the several issues which are made in this petition, I will consider some of the claims that are made in the case, and that are insisted upon.

The principal claim is that the assessment exceeds the amount authorized by law under the statutes, limiting the right to assess for 25 per cent. of the value of the lot after the improvement has been made. Another defense is made and claimed that these lots, triangular shaped lots, and lots having a very large frontage upon the street, or extending in a long line upon the street, or longer than others, in proportion to their depth and in proportion to their area, should be diminished in

frontage. But, it is admitted that the proceedings of the council were regularly had; that the assessment was not invalid by failure of the council to take such proceedings for this improvement as are required by law.

In respect to lot No. 19, which is a triangular lot, it is insisted that this lot has no frontage upon the street that is improved, also the lot No. 18. We will say both lots, No. 18 and 19, do not front upon the street improvement, but their front is upon Oak street. Lot No. 19 is a triangular lot—it is in the form of a right angle triangle. The base of the triangle lies upon Oak street, the hypotenuse of the triangle on Front street, and it is insisted, though this lot is not improved by its use, that its front is upon Oak street, and this front is about fifty-two feet. We will say that while this line of lot 19 upon Front street is considerably longer than the base of the triangle which lies upon Oak street, the owner insists that the ruling adopted in *Haviland v. Columbus*, 50 O. S., 471, should not be applied against this lot and should not be assessed against the front on Oak street. Counsel insists that on these lots, both 18 and 19, the court should take the superficial area of each lot and divide it by the ordinary depth of lots on that street, and that the quotient should be the front given to that lot, and that would be the proper frontage.

Now, as to lot 18, that evidently fronts upon Oak street. Front street cuts off one of the rear corners of the lot, and leaves a line there of about forty-five feet on Front street. The real front of that lot—the frontage on Oak street, does not appear on this plat and nobody has stated what the frontage of that lot is. But counsel suggests two ways of equalizing that assessment. First, by drawing two lines from the extremities of the line of the street, in one case perpendicular to the line upon the street and the lot on the street, until it reaches the line of the lot, and take the area thus enclosed, find the superficial area contained, and divide that by the depth of lots on the street, and this should be the front. Now this comes to the same thing as assessing lots by their superficial area. The decision of the circuit court of Hancock county is cited here in support of that claim. Now this decision was made at the May term, 1893, by the Hancock county circuit court, and the opinion was given by Judge Seney. The case of *Haviland v. Columbus*, supra, was decided June 20, 1893, by the Supreme Court. There is nothing in this decision of the Hancock county circuit court to indicate the day on which it was made, only that it was made at the May term. Now this at Columbus was made June 20, 1893. It is possible that this decision by Judge Seney was made previous to the decision of *Haviland v. Columbus*, supra. Decisions in the Hamilton county common pleas court are also made, but I think it unnecessary to examine any of these decisions. The Supreme Court, I think, decided this in the case of *Haviland v. Columbus*, supra.

The case in Hancock county was disposed of on demurrer to the petition.

Haviland v. Columbus, supra, was a suit by the owners of lot No. 11, Nelson's addition to the city of Columbus, situate on the corner of Main street and Miller ave., and fronting thirty-seven and one-half feet on Main street, and extending along Columbus avenue seventy-five feet. And it was further stated that the city council by ordinance improved Miller avenue, and made assessment on the fronting property for its entire length on the avenue, the entire amount of assessment being

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§775.25. It is alleged in the petition that other lots on the street have a frontage of thirty-five feet and 150 feet in depth. They further say that under it, their lot should only have been assessed for the frontage on the avenue which it would have had if reduced to the same depth as other lots on the street, that it has been assessed without regard to depth of other lots and wholly without regard to the benefits; that they took no part in permitting assessment. Now sec. 2264 Rev. Stat., provides that all cases where the costs and expenses, or any part thereof are not assessed on the general tax, they shall be assessed on the abutting or other lots in proportion to the benefits to the property, or to the value to the property or by the foot front of the property bounding and abutting on the improvement. The council in this case adopted the latter mode by foot front of the lot. You will observe that the court remarks here, that by reason and language of the statutes where the statutes adopt the mode of assessment by foot front, it must, in assessment of lots, have regard to what the front of the lot is; it may abut and yet not front on the improvement or any part thereof. Hence where it abuts lengthwise, as in this case, it must be decided whether the length is the front or not, as we understand it abuts on another front, as in this case, it be regarded as fronting lengthwise on the improvement, and the assessment should be for the number of feet the front should have—that is to say $37\frac{1}{2}$ feet and no more. It should be observed in this case, that the lot of the plaintiff lay lengthwise upon Miller avenue and said improvement, but its length there was 74 feet. The depth of lots on that street was 150 feet.

The parties were making the same claim as here, that the court should adopt another mode of assessment than that adopted by the council; by superficial area and not by the foot front, and yet the court says there, that this lot not having any ordinary depth, should be assessed its full frontage, 37 feet, and it was so ordered in that case.

So that the claim of the defendant here is that these lots should be reduced to a frontage such as they would have provided they went the full depth of the lots on the street. That claim is contrary to the rule laid down in *Haviland v. Columbus*, supra. The statute provides three ways in which a city council may make an assessment: First, in proportion to benefit which may result from improvement; second, in accordance with the value of the property assessed, and third, by the foot front of the property bounding and abutting on the improvement. The Supreme Court says in *Haviland v. Columbus*, supra, that whatever mode may be adopted the assessment must apply with uniformity to all the property that may be assessed. The assessment by foot front may not be in theory in accordance with benefits, but it is found to be more practical, because of the difficulty of applying any other method. To make it just and equitable, the council thought best to make it the foot front and not by value or benefits. The court found, undoubtedly, that they had no power to make an assessment. The council is confined to these three methods by statute, and when the council has adopted one of those methods, and it results inequitably to the owner of any lot, the court will administer equity in so far as possible, without departing from the method, because the court has no power to pass upon the act of the city council, or as to an equalizer upon this assessment. So, both upon principal and authority, the court cannot adopt the method insisted upon by the defendant Gorrill here, on lots 18 and 19.

The council has made these assessments; their proceeding were regular; they have adopted this method, and the court is powerless to make another assessment.

We come now to consider the limitations provided by the statutes. It is provided by statute that no more than 25 per cent. of the value of the lot after the improvement has been completed, shall be assessed upon any lot, and we have taken account of the evidence that has been given of the value of these lots, and we have arrived at an estimate of the value. These lots are upon a street which extends into the water—most of them are partly covered by water, and lay there low—below the street. The street at its Westerly terminus has no outlet. As to the propriety of improving that street the city council were the sole judges. This court is not called upon to pass on that question; that is a legislative question and the court has to dispose of judicial questions.

It is said that none of these owners petitioned for this improvement; that it was unnecessary. But that question, as I understand it, is a question for the council alone. The court has no authority or jurisdiction upon that question, it is a legislative one, as I have remarked.

These lots lie here, some of them, in an irregular shape as relating to this street, laying under water, and if the court was to exercise an individual judgment, I am inclined to think we should place the value of those lots at as low a price as given by any witness in the case, but the court is not to judge in that way; we must go by the evidence. We think some of these witnesses have placed an excessive valuation upon the lots. We have not given very much weight to their evidence; we have endeavored to weigh this evidence in accordance with the means of knowing its value, which the witness had. And without taking time to go over the lots one by one, I will announce the value that the court puts upon the lots according to the best judgment we have been able to form upon the evidence.

The evidence upon the value of the other lots is almost as various as upon this lot No. 18.

The court values lot No. 18 at \$500; No. 19 at \$120.00. I will say that the defendant Gorrill says lot No. 19 is not worth over \$125.00, but we arrive at the value of \$120.00; lot No. 20, \$550.00; No. 21 at \$400.00; No. 22 at \$300.00; No. 23 at \$210.00; No. 24 at \$150.00; No. 25 at \$75.00; lot No. 26 three witnesses testified that the lot was not worth anything, and there were three witnesses testified that the lot was worth \$100.00; one witness that it was worth \$90; one that it was worth \$75.00; two, that it was worth \$25.00, and two, that it was worth \$20, and the value that I have fixed upon for that lot is \$25.00. I think that it is worth something although of very little value. Lot 26 at \$25.00; No. 27 at \$100; No. 28 at \$220.00; No. 29 at \$240.00; No. 30 at \$240.00; No. 31 at \$175.00. These assessments will be enforced to the amount of $\frac{1}{4}$ of these valuations of the different lots.

There is a question of costs here. The court I suppose has the power of a court of equity to distribute the costs equitably. I think the plaintiff should recover their costs excepting the costs of evidence. The fees of the witnesses called on behalf of the plaintiff, should be charged to the city. The plaintiff only recovers their own costs; that leaves each party to pay the costs made by him. There is no order of the court for the defendants costs; they must settle their costs.

The right of way of the Toledo & Ohio Central R. R. Company and the Pennsylvania Company, not abutting on this street at all cannot be assessed for the improvement.

P. A. MacGahan, for plaintiff.

R. S. Holbrook, W. S. Thurston and A. W. Eckert, for defendants.

INSURANCE—BANKING—USURY.

[Lucas District Court, March Term, 1883.]

ELIJAH B. HALL, TREAS., v. FREDERICK KUMMERO ET AL.

A foreign insurance company which loans money upon mortgage security as an investment, does not violate a statute which provides that no foreign corporation or company, doing a banking or any other kind of business in connection with insurance, shall do business in this state, and such loan and mortgage are legal.

Where the highest legal interest is paid upon a loan the fact that a commission was allowed the agent for negotiating the loan does not make the contract usurious, when the agent was agent only for the purpose of securing applications for insurance and delivering policies.

HAMILTON, J.

Elijah B. Hall, treasurer, v. Frederick Kummer et al., comes into this court on appeal. The action was originally brought by the treasurer to subject certain property to the payment of taxes standing upon the duplicate, and remaining unpaid. Among the defendants who are made parties to this proceeding was the Massachusetts Life Insurance Co., which held a mortgage upon the property that was to be subjected. The real owner of the property was Mr. Kummer. The claim of the insurance company is, that it holds a mortgage upon this property executed to it by Mr. Kummer, the owner of the property. It seems that application was made to Mr. Dewey for a loan, Mr. Dewey being the agent of the insurance company at this point. Mr. Dewey said to him that it was a rule with the company not to make any loans of its funds except to those who took out policies in the company, where upon a policy amounting to \$2,000 was taken out. Application was made for such a policy by Mr. Kummer, and subsequently taken out. The property was looked at, and an appraisal had of it, it being appraised, I think, at some \$5,000. An arrangement, so far as might be, was made between Mr. Dewey and Mr. Kummer that he would make a loan of \$2,500 subject to the approval of the company, Mr. Dewey saying that he was not the agent of the company for the purpose of making the loan, and that all he could do was to receive the applications and submit them to the company. The papers were drawn up for a loan of \$2,500. They were sent on to the company. The company, in looking the matter over, concluded that they would loan only \$2,000. They so instructed Mr. Dewey, and sent on the money. Instead of drawing the papers over again, \$300 was credited upon the note as of its date, leaving the loan \$2,000. The premium upon the policy taken out was \$120; the abstract of title was \$15; and it was agreed between Mr. Dewey and Mr. Kummer, that he was also to pay Mr. Dewey a commission of \$75. That was also taken out of the money that was sent on, and the balance paid

over to Mr. Kummero, and this mortgage put upon record. In the cross-petition of the insurance company, they set up all these facts and ask for a foreclosure.

Mr. Kummero defends, first, upon the grounds of usury—in substance—. He says substantially that this \$75 by way of commission was a scheme to get more than the legal rate of interest, the loan itself drawing eight per cent. interest, payable annually. And secondly, he says that the company had no power to make such a loan, or rather that it was illegal, they being prohibited by the laws of Ohio from making this loan, under the statute, which reads in substance that no company or corporation originated under any laws of any other state of the United States, or any foreign government, doing a banking or any other kind of business in connection with insurance, shall do business in this state. While it is conceded that in the absence of any general statute, or any special provision of the statute, that a foreign corporation has the power to place its loans or otherwise in this state, yet, when it is prohibited from so doing by the express words of the statute, their doing it after that becomes an illegal contract, and is absolutely void, and cannot be enforced; hence, this being so, there is no cause of action whatever, and he is entitled to take his money and keep it.

Now we are of the opinion that the provisions of this act are not applicable to a case of this kind. In the first place, we don't think a man can be said to be doing a banking business, because he happened to accumulate a little money in his legitimate business and loans it for purposes of investment. We don't think that anybody would be charged with doing a banking business who happens to do that; if we did, we would have a great many bankers in the country.

And while it may be said, as it is said in this case, that Mr. Dewey was an agent only for the purpose of taking policies—taking applications and getting out policies—that he was not an agent for the purpose of loaning money—it is alleged that he was doing a different kind of business altogether; that the loaning of money was not a part of the insurance business; that he was an agent of the insurance company, but not for loaning money, and therefore that means something else. Well, whether this loaning of money, loaning of funds belonging to the company, itself can be said to be doing another kind of business or not, or if it be the same business, whether it may adhere to the business, the duties of the agent, it may be well said that a man may be limited in his business: he may be authorized to do a certain part of the business, and not authorized to do the balance. But we think the purpose and object of this statute was to prevent foreign corporations doing an insurance business coming into this state and engaging in any other speculations, any other business transactions—that is, any separate and independent business transactions. The theory of the law was that they shall be confined to the business of taking insurance, confined to that and to no other, as a sort of security to the policy holders taking out policies in this state. It is provided by our statute in another section of it, that before any foreign insurance companies shall do business in this state, they shall deposit with the secretary of state a hundred thousand dollars of securities, invested in bonds of this state, or of the United States, or in mortgages upon real estate situated in the state? Now, they are to get those mortgages in some way, and upon real estate; and it is further provided that they may change these securities from

time to time. For instance, if they had bonds of the United States deposited, they might change them into mortgages by getting the mortgages and depositing them in place of the bonds. But it is said that this is an investment independent and distinct from a loan; in other words, that while the company would be thus authorized by this statute to go out in the market and buy a mortgage, if they could happen to find one that was executed somewhere, that they could not loan the money and have the mortgage executed to themselves, and thus provide securities in that way. Now it seems to us that it is a very great refinement to say that a man may go out and get mortgages already executed, but that he cannot take his own money and get the mortgages in that way: in the one case it would not be business, and in the other case it would be business under this statute. We are inclined to the opinion, as already indicated, that this statute does not cover any such purpose; that a man, and that this company, has a right in its legitimate business of insurance, to go upon the market or take its funds and invest them in mortgages in the state. While were we to take the other doctrine, apply the other rule to it, it would absolutely exclude every dollar thus loaned in the state of Ohio in the way of insurance from the commercial transactions of the state—drive it out of the state. Insurance companies could not invest their funds here at all; it would send them out somewhere else. We don't think that that is the policy which is covered by the statute at all.

A decree may be taken in favor of the insurance company.

We ought to say that where the contract with the defendant was that he was to pay \$75 as commissions, and it was so understood at this time, and likewise understood that Dewey was acting for the insurance company as its agent—that where it is perfectly understood that the contract was to pay this commission—he ought to pay what he agreed to pay.

There is a question of estoppel that has been argued in this case, and that question is whether the defendant—Kummer—having taken the money—is not estopped. We need not stop to argue that, as we are satisfied that the position taken is the correct one.

STREET ASSESSMENTS—CONTRACTS.

[Lucas District Court, March Term, 1883.]

TOLEDO (CITY), FOR USE OF WERNERT ET AL. V. GRASSER ET AL.

1. The law of 1878, (75 O. L., 313), relating to taxation, permits special improvements, and allowed assessments upon the abutting owners.
2. Where there were no specifications, etc., on file at the time a resolution to improve a street was passed, but such specifications were on file and approved by the council before the passage of the ordinance providing for the doing of the work in accordance with the resolution; whether such specifications were ever adopted by the council, quære.
3. The determination of the council as to the kind of plans for any given improvement cannot be questioned in the courts.
4. The "substantial defect" contemplated by 75 O. L., 313, must relate to the construction provided for by a contract legally adopted.
5. The city cannot, by the acceptance of the work without a substantial compliance with the terms of the contract, affect the right of a citizen to plead such non-compliance as a complete defense to an action for the collection of an assessment therefor.

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6. What is a "substantial defect," depends upon the facts of each case, in view of the objects sought by the improvement, and their attainment of the work done.
7. Where the contract provided for the doing of the necessary drainage in the manner directed by the committee on streets and the city engineer; as between the city and an abutting owner, this is a contract to do the necessary drainage. In such case the city cannot shelter itself under the provision that the manner of doing the work was left to the sole discretion of its public official.

HAMILTON, J.

In the case of the city of Toledo for the use of Ignatius Wernert v. Joseph Grasser et al.: The case is before us on appeal from the court of common pleas, and it was brought for the purpose of collecting an assessment upon certain property of the defendants located upon Erie street, the assessment being made for an improvement, to-wit: the macadamizing of Erie street. A very large number of witnesses were before the court in the hearing of this case, and the court has spent much time in its consideration. We were told that it was a test case, involving many other assessments upon the same street for the same thing; and in view of the importance of it, and the length of time consumed in its hearing, and the very many questions involved, we have given to it such consideration as we have been able to, within the time allowed to us. And while we have been unanimous upon the questions of law that have been raised in the case, so far as it has become important to pass upon them in this case, we have not been unanimous in reaching a conclusion upon this case, and the opinion of the court will therefore be the opinion of a majority of the court.

The petition substantially avers that the resolution for making this improvement was passed on January 13, 1879, by the common council of the city. Its language is in substance: Resolved, that Erie street—a public highway in said city—be improved from the curb line on Monroe street to the bridge over Swan creek by macadamizing the central thirty-six feet thereof, from the curb line on Monroe street to the bridge over Swan creek, in accordance with the plans, and specifications, and profiles on file in the office of the city civil engineer. It is then averred that this was approved by the mayor, or that he retained it—that his approval was to be inferred by operation of law. And it was also resolved that the cost and the expenses of this improvement should be assessed on the lots and lands abutting upon that street, and that it should be payable, one-half on completion of the contract, and the balance in one year thereafter. It is averred that it was duly published, and advertisement for bids was duly made, and in pursuance thereof the Toledo Paving Co. made its bid, and that it was accepted by the city and a contract for doing the work made; and that said company completed the work in all respects according to the contract, and the same was accepted by the city. That afterwards, on December 29, 1879, by an ordinance duly passed there was assessed upon the abutting property the cost and expense by foot front, and the assessment assigned to the Toledo Paving Co. and payment ordered to be made to the company, one-half in ten days and the balance in a year. That defendant Grasser was the owner of certain premises on the street, and that there was assessed thereon the sum of \$381.56; that the right, title, and interest of the company has been transferred to this plaintiff, Ignatius Wernert; that the defendant has refused to pay. And the petition therefore ask that a lien for the

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assessment and interest and penalty be enforced by the decree of this court.

The answer in substance says, that on January 13, 1879, when the alleged resolution was passed, neither at that time or at any time before that, were there or had there been any plans, specifications, or profiles on file in the engineer's office, and that they were never on file; that no such specifications for such improvement was ever approved by the common council; that the alleged specifications were so deficient that the improvement made thereunder would be and was worthless, and conferred no benefit upon the abutting property; that no resolution or ordinance was ever passed by the city for anything else than to macadamize, and yet as part of the pretended improvement they claim to have done and have assessed for so doing, certain other work, to-wit: a certain sum for excavating, for curbing, for cross-walks, for catch-basins, man-holes, lumber, iron, pipe, etc., amounting in all to the sum of \$7,034. The answer admits that an advertisement for bids was made for macadamizing, but it says that the bids received were not for macadamizing alone, but included a large amount of other works not advertized, and not included in the resolution or ordinance providing for the macadamizing, to-wit: this extra work that has thus been specified. It denies that the contract with the paving company covered the work provided for by the wording of the resolution or ordinance. It denies that the company at any time did complete the work provided for by the contract in any respect in accordance with their contract, and avers that there is a substantial defect in the construction of the improvement; that the work was not made to conform to the established grade. It denies that the pretended assessing ordinance was of any validity whatever, and avers that the assessment upon this lot of the defendant was more than twenty-five per cent. of the value of the lot after the improvement was made. There are a large number of other objections to this assessment set out in this answer, which we deem it unnecessary now to mention. It winds up with the declaration that this assessment is wholly illegal and void, and asks that it be set aside, and that the defendant's land be freed from the apparent incumbrance thus placed upon it by this pretended assessment.

The reply is a denial of the defenses of the answer, except that it avers that after the passage of the resolution and before the passage of the ordinance for making the improvement, the council caused plans and specifications and profiles to be prepared and placed on file in the engineer's office, and the same were approved by the council. We notice that here is an admission that at the time of the passage of this resolution which alludes to the plans and specifications and profiles on file, that none such were on file at that time, or were made. The ordinance when it was passed referred to the doing of the work in accordance with the resolution.

The first inquiry that is made—the first objection upon the hearing of this case naturally in order, is one that is made by the defense upon the theory that the law which was then in force, to-wit the law of 1878 relating to taxation, did not permit any special improvement to be made and taxed upon the abutting property, where the improvement was of the character named; that it only referred to the opening of a street and the appropriation of land for that purpose, and the improvement of streets thus opened and improved; and that no warrant of law is contained anywhere in the statute book, or was at that time, for assessing

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the abutting property owners, or assessing anybody, except for paving a street that has been heretofore laid out. It is sufficient to say, without a discussion of that subject in detail, that we are of opinion that the whole scope of the statute when read together, the whole purport, intent, spirit of it, would be violated by such a construction, and that there was authority at that time to make a special assessment, and that it was not necessary to confine such improvements, or to pay for such improvements, by tax upon the entire property of the city, as is claimed.

The next question presented is, did the council ever adopt these specifications, plans, and profiles? It will be noticed that it is conceded in the pleadings, as already remarked, that no plans, and no specifications, and no profile were on file in the engineer's office or in any other office, or were there any in existence, at the time of the passage of the resolution; and that the ordinance, as already remarked, refers to the doing of the improvement in accordance with the aforesaid resolution. Now if we can gather what was intended and designed from the reading of the resolution and the ordinance together, it is very difficult to see from that language alone that the city authorities, or council, had before them at any time—at least they have not so said—these specifications, or that there is anything embraced in the language either of the resolution or ordinance that enabled them to consider and to pass upon any specific specifications, or plans, or profiles. But waiving that question, and assuming that the council did at some time act upon the plans and specifications that were afterwards drawn by the engineer—and it is in evidence that they were before the council, or that they were drawn in the engineer's office at the time of the passage of the ordinance itself—assuming then that there was nothing irregular in that, and that the judgment of the council had been obtained upon the character of those things—those specifications and profiles—the question arises, was there a substantial defect in the construction of the improvement? And first, perhaps, what of the statute and its meaning, and what and how great must the defects be to fall within its scope and purview? We think the council have the power to determine what kind of an improvement by way of constructing a road-bed for a street it will adopt and authorize, and to determine how it shall be built, and that whenever that power is exercised in good faith we do not think that the city can be held to be under cover of this statute or any other; that the improvement when made in accordance with the legislative will of the council embodied in its ordinances legally enacted is worthless or defective in itself, or of no benefit, either wholly or partially, by reason of the kind of paving or other improvement thus adopted or of its plan of construction thus prescribed. Under the statute 75 O. L., 313, is, "The acceptance of the work by the council on the certificate of the engineer, shall be presumptive evidence that the contract has been complied with, but a substantial defect in the construction of the improvement shall be a complete defense." To hold that a citizen can appeal from the legislative wisdom of the council in determining the kind of the plans in the construction of any given improvements, would, it seems to us, be converting the courts into a species of legislative body. We therefore hold that the defect contemplated by the statute must relate to the construction provided by a contract legally adopted, and when the contract is made and the work done under it, there must have been a substantial compliance with the terms of the contract, and the city cannot, by an acceptance of the work without such compliance, affect the right of a citizen to plead

such non-compliance as a complete defense to an action for the collection of an assessment therefor. As to what amounts to a substantial defect, must, we apprehend, depend largely upon the facts in each case, taking into view the objects designed to be obtained by the improvement and the extent to which those objects have been attained by the work which was actually done.

In this case the contract was to improve Erie street by grading and macadamizing the central thirty-six feet of the same between Monroe street and Swan creek, together with the necessary curbs, gutters, etc., and providing the necessary drainage, in conformity to the specifications for said work. The contractors were to furnish all the materials and labor for the improvement. Among the specifications were these: "Embankments must be wet, rolled and rammed, until perfectly solid, so as to prevent future settling." (2) "All drainage necessary for the improvement * * * will be made at such points and in the manner directed by the Committee on Streets or the City Civil Engineer." (3) "Thirty-six feet in width of the central part of the street shall be macadamized, and will conform to the following cross-sections, viz., the center line of the street shall be at grade; the gutter eight inches below grade; the top of the curbstone at grade; and the carriage-way, or space between the gutter, an arc." (4) "After the road-bed shall have been prepared, a layer of sound hard stones shall be spread uniformly over the full width of the thirty-six feet, and for such distance longitudinally of the street as may be directed, not less, however, than two hundred feet. This first layer will be composed of stones broken into fragments varying in size from one inch to five inches square, and will be eight inches deep; and will be thoroughly rolled and consolidated before the succeeding layer is put on. After which the second layer, five inches deep, composed of the same quality of stone as the first layer, broken into fragments varying in size from one inch to three and one-half inches in size, shall be spread and rolled as provided for the first layer. Upon the second layer thus put on will be spread the third layer, five inches deep, composed of firm hard lime stone broken into fragments varying in size from one-half to one and one-half cubic inches. The whole will then be thoroughly rolled and consolidated, leaving a smooth and true surface with a crown of eight inches from the center down to each side. There will then be spread a layer of coarse sand or fine gravel, two inches deep, over the work, and it will be again rolled, and left smooth and even." Passing by the other issues in the case, we enquire whether or not this contract has been substantially complied with, and if not, in what the defect consists. Over sixty witnesses have been heard in this case. I shall not now attempt any summary of their evidence, but shall call attention to a few of the facts which we think are established.

First, the work was completed, such as it was, some time in December, 1879; that the road-bed was then loose, porous, and far from being solid. Second, during the ensuing year it had settled in many places, and the crown of the road had in some places nearly disappeared. Third, in the spring of 1881, and not over a year from its completion, a street railroad track was laid upon it at grade; and it was thus incontrovertibly shown that the center of the street had then sunk from one to six inches along its entire course. Fourth, that soon afterwards, when the travel was thrown from the center to the edges of the road by the location of the railroad track, these traveled portions of the road sunk very soon, very much more. Fifth, we find that the road was not thoroughly con-

solidated, as stipulated in the contract. Sixth, we find there was no suitable or necessary under-drainage to this land; to which one of the principal witnesses, Mr. Casey, called for the plaintiff, who was superintendent of the Toledo Paving Co., in doing the work, attributes the failure of the road, thus admitting that it is in fact substantially defective. And that is the testimony on the subject of other witnesses called on both sides. But it is alleged that whatever defects arise from this want of a properly prepared road-bed and suitable drainage was a defect in the plan and method of doing the work adopted by the council, and hence, is not one of the defects which can be complained of. And again, that this necessary drainage was by the terms of the contract itself, to be put at such points and in the manner directed by the committee on streets and city civil engineer, and it is contended that the contractors have done this, and hence the contract has been complied with in that respect. But one fact is evident, that the necessary drainage was not furnished at all. And the council, knowingly, and in the nature of things, could not adopt as its judgment of how the work was to be done a method which lay in the future, and then know from the judgment and discretion of its engineer and committee on streets. And as to the terms of the contract not having been violated, we think whatever may be the rule as between the city and contractors, it must be held to be a contract to do the necessary drainage, so far as the parties upon this road are concerned. In other words, the city cannot say that a street shall be improved by paving it to a certain depth with stone, and leave all else to the discretion of the officer, and generally shelter itself by saying, when the contract is imperfectly carried out and a defective road is built, that "We made a contract which is to be governed by the sole discretion of the public officer, and that discretion—that plan—we knew nothing of; left it to him." The plan could not have been adopted by the city under such circumstances. As to the wisdom of this statute, which has been since repealed, perhaps it is not important for us to say anything—that a street thus improved and properly thus benefitted should not pay to the extent of the benefits actually received; but we regard this statute imperative. We think the legislature have acted wisely in taking it from the statute book. It remains for us, if we find that the defect did exist, to enforce the statute.

There is one other feature that we ought to call attention to, and that is, in view of this being a test case, as it is said, and in view of the probability that the case will ultimately go to the Supreme Court, that in case we should be found wrong in our interpretation of it, it should be reversed upon that ground, and with a view to putting it in shape to render a final judgment upon it if the parties see fit to embody it in the journal entry: we say that we find that the assessment on this property, if it was a valid assessment, was in excess of twenty-five per cent, and we will fix the value of that property at that time at \$1,000. Then the assessment can be placed upon it upon that basis, deducting what was formerly assessed upon it a short time before for the improvement of Lafayette street, which amount is not in dispute. That will enable the parties to determine what the amount of the assessment should be at that time.

With these views, we can come to no other conclusion, of course, than to grant the prayer of the defendant that this assessment be declared void as to this property, and that this property be removed from the lien of any assessment thus made.

GUARDIAN AND WARD.

[Lucas Common Pleas.]

MINNIE BOESCHER V. JOSEPH BOESCHER.

1. Every right that can be made the subject of an action for the recovery of damages, is a right of property, including the right to the comfort and society of a wife or a minor child.
2. The right of a parent to the possession and society of a minor child, is a right of which the parent can be deprived only when he has forfeited that right, by misuse of the child, or other proper reasons. *Shroyer v. Richmond et al.*, 16 O. S., 455, distinguished.
3. Section 6255, Rev. Stat., limits the power of appointing a guardian to cases where the minor has no parents, or where both are unsuitable, and in proceedings to appoint a guardian, such qualifications must be shown, and the parent given an opportunity to defend, by being made a party. A failure to do this is not due process of law.

LEMMON, J.

Some years ago, in a case where I had an opinion securely fixed in my mind, but still was willing to listen to argument—and did so—at the close of the argument I decided the matter, giving my reasons. One of the attorneys quietly remarked that if I had intimated my opinion, he would have been saved a day's hard work; and I felt that it was a just rebuke, for I really had a conviction in regard to it. And we may say to you that, in this matter, perhaps we should, in justice to the attorneys, state our views now, and, if you wish to combat them, you may do so and we will listen to them as fairly as we can. It may be well to understand the mind of the party who must take the responsibility of deciding the case.

In the first place, we will say to you that, as we understand it, every right that can be made the subject of an action for the recovery of damages, is a right of property, including the right to the comfort and society of a wife or a minor child. A parent—a father—or, if the father has not the care, the mother—has a right to bring an action for damages—one well known action for damages for the debasement of a daughter, and, in the recovery, she is not limited to the value of the services, but may recover beyond that, for the loss of society. Now this is a property right. By the Magna Charta that was executed and obtained from King John, at Runnymede, in 1215 A. D., a principal was established in English law that no property should be taken from any one except by the judgment of his peers, and it is there so stated. In the constitution of Ohio, it is declared by much closer selected language, and it is understood and has been declared by our Supreme Court over and over again, that property shall never be taken except by due process of law, and our Supreme Court has held that that means a right of trial in the ordinary course of law. It is no answer to it in my mind to say that a guardian may be appointed; the question which we must bear in mind is, not whether the court has power to appoint a guardian, but the question is: whether the court has the right and the authority to take from the possession and control of a parent his child, at its will; I must say to you that I am clear in the proposition that no court has, or ever had. The right to the possession and society of his minor child, is a right of which the parent may be deprived, for proper reasons, but only when he has forfeited that right by misuse of the child, or by something

that will justify a court of chancery in interfering and for the protection of the child, for that is recognized as a leading principle for taking the child away from the parent. But before this can be done, there must be some form of adjudication—there must be a due process of law; these rights cannot be conveyed by a mere form of words, such as the appointment of a guardian.

This line of thought has been running through my mind since the commencement of this trial. Judge Scott, in *Shroyer v. Richmond et al.*, 16 O. S., 455, uses language which I think he would not have used had he been hearing a case like the one now on trial in this court. In that case, the issue arose upon an action against the jurisdiction of a guardian on a guardian's bond. By giving that bond, these sureties had enabled the guardian to obtain money. He had used that money up and spent it, and it was not necessary for the court to say a word about the matter of the power of appointing a guardian. The truth was that the doctrine of estoppel existed in the case and it was not necessary for the court to decide anything else; and the court in its remarks, shows that the things which are said even in the syllabus, as well as in the decision of the court, were not necessary to its decision. It was concerning the guardianship of an adult who was an imbecile. No persons had any right of society in the person. It was a mere question of guardianship for the protection of the individual himself, and therefore the language of the court has a great deal more significance in saying that it was a case in rem (p., 465). That I am right about this, I will read a little from the case. I am astonished at the ruling of the court of common pleas, that held there that the jury should determine the question as to issue of fact as to whether the probate court had acquired jurisdiction to issue these letters of guardianship.

Mr. Southard: As to whether he was in fact an imbecile—that was under the old constitution.

The Court: It is the strangest rule imaginable. I do not wonder that the Supreme Court felt indignant that the court of common pleas should make such a ruling as that; that the jury selected to try one case should exclude the oral testimony and determine whether the probate court had jurisdiction to appoint a guardian. The Supreme Court—Judge Scott, says: (417.)

"there is another ground upon which those defendants should not have been permitted to gainsay the regularity of the appointment of the principal, Coblentz, as the guardian of Harry Long. They were sued upon this bond as such guardian, which was executed by them as his surety; and this bond recites the appointment of Coblentz, by the proper authority, as the guardian of Long. By executing this bond, they obtained for their principal the possession and control of his ward's property, and can not now be permitted to escape liability to account therefor by denying the recitals of their own bond."

Now it is perfectly clear, and therefore it was unnecessary for the court to consider those other propositions. They did do it, however. We must all, in considering a decision, look at the parties in the case and the particular question which the court is addressing its language to. This case then before the court was a case where no one else had any property right, no right which they could assert in a court of law, and therefore we say that it is not applicable to the case that we have before us. We cannot consider it as authority.

But there is another reason; counsel have evidently overlooked the

statute. The legislature has not been silent on this matter. The very power which authorizes the probate court to appoint a guardian limits the authority of the guardian in that respect and denies its right to take possession of the child away from its parents. I will call your attention to sec. 6264. It is in the statute in regard to minors—beginning under the head of "Minors;" "Guardians and Trustees," is the heading of the chapter. This is the statute under which guardians for infants are appointed by the probate court, and the only statute, sec. 6254, Rev. Stat., is as follows:

"The probate court in each county shall, when necessary, appoint guardians of minors resident in such county.

"Section 6255. A guardian may be appointed to take charge only of the estate of a minor; and at the time of, or subsequent to, the appointment of such guardian to any minor having neither father nor mother, or whose father and mother are both unsuitable persons to have the custody and tuition of such minor, or whose interests will, for any other cause, in the opinion of the court, be promoted thereby, the court may also appoint a guardian to have the custody and provide for the maintenance and education of such minor: provided, however, that if the powers of the person appointed guardian be not limited by the order of appointment, the person so appointed shall be guardian both of the person and estate of the ward, etc."

Now the power in this section to appoint a guardian of the person and to have charge of the education and custody of the child is given but it is given with a limitation: "Such guardian to any minor having neither father nor mother, or whose father and mother are both unsuitable persons to have the custody and tuition of such minor," that must be found in the case.

Now let us turn to sec. 6264, Rev. Stat., in the same chapter.

"Sec. 6264. Every person appointed guardian both of the person and estate of a minor, shall have the custody and tuition of this ward, and the management of such ward's estate during minority, unless sooner removed or discharged from such trust, or the guardianship shall sooner terminate from any of the causes specified in this chapter: provide that the father of such minor, or if there be no father, the mother, if a suitable person, respectively, shall have the custody of the person and the control of the education of such minor.

Now, where is your right for this grandfather to step in here and deny the mother of the right of possession of her child?

Mr. Southard: "Suppose they are not suitable persons?"

The Court: That must be found, and found in a case where they are made parties and have an opportunity to defend. There is no doubt but that the statute recognizes that fully; it is a property right, and cannot be taken away except by due process of law. This grandfather, therefore, when he went to the probate court and solicited the appointment of a guardian—of himself, with a view of taking possession of this child, without notifying its parents—that could not, solely, be taken from them without due process of law. But here he takes the child, about which the affections of the mother cling, he takes without their being a party to the case, without her having been heard and so it is a proceeding wholly without authority as to the mother.

CHATTEL MORTGAGE—GAS AND OIL LEASE—PLEADINGS.

[Lucas Common Pleas, June 8, 1895.]

JOHN FUHER V. BUCKEYE SUPPLY CO. ET AL.

1. Whereupon a chattel mortgage, being given, the mortgagee takes possession, it is not necessary to file or re-file the mortgage.
2. The expense of an unsuccessful effort in "fishing" for lost tubing, may be a proper item of expense in favor of a mortgagee in possession of an oil lease, in an accounting.
3. When a wife is entitled to a royalty on an oil lease owned by her husband, and she permits him to transact her business, such royalty cannot be asserted against a mortgagee of the husband without notice.
4. Such claim for royalty is, however, prior to the claims of other creditors, because it is an equitable right.
5. Where matter is brought before the court in the pleadings of one party, such party cannot object to this matter in a subsequent pleading of another party, on the ground that it is misjoinder.
6. An answer presented to be filed at the time of the trial, may be considered as filed.
7. An allegation that certain matters constitute "a first and best lien," is a mere legal conclusion, and does not constitute the assertion of a claim to a certain fund.
8. Where one tenant-in-common mortgages the property and gives possession to the mortgagees, the other tenants-in-common must be given their share of the income in the hands of the mortgagee before the mortgagee can apply such income on the mortgage.
9. The principles of set-off are not applicable as between a debt owing by a partnership, and a debt owing to the partners, as tenants in common.

PRATT, J.

I.

The first question that I see in the case, and one of the important ones, is, as to the rights acquired by Mr. William Hardee, or by the Buckeye Supply Co., under the mortgage made by Fuher & Villwock upon their interest in their partnership property, and the transfer order made to Mr. Hardee for the benefit of the company; and, so far as these are concerned, I have reached the following conclusions, upon the facts and the law as I understand it:

(a.) That the chattel mortgage obtained by the Buckeye Supply Co. from Fuher & Villwock, is good, so far as the tangible property is concerned.

(b.) That the transfer order constituted an equitable assignment of all the oil production from the Fuher & Villwock leases. (In all this I am referring to the Fuher & Villwock partnership property.)

(c.) That these two—the chattel mortgage and the transfer orders—gave the Buckeye Supply Co. a lien in equity upon the entire Fuher & Villwock interest in that property.

(d.) That the mortgage was made directly to the Buckeye Supply Co.; and the transfer order (though made to Mr. Hardee, was—and for certain reasons somewhat explained in the testimony, seemed to be necessary to be made to an individual instead of to a company) was made for the benefit of the Buckeye Supply Co., of which Mr. Hardee was a member and of which he was the secretary.

(e.) That these instruments received by Hardee under these two

instruments were made to secure the sum of \$7,703.41 evidenced by a note given by Fuher & Villwock to the Buckeye Supply Co.

(f.) That the Buckeye Supply Co., acting through Mr. Hardee, immediately—or at least very soon thereafter—took such possession of this Fuher & Villwock property as it was capable of and thereafter paid the expenses of operating the same and received the proceeds of all the oil produced, and that they have continued such possession and such receipts to the present.

(g.) That it follows that the Buckeye Supply Co. should account, and that upon such accounting the net proceeds should apply upon the debt of Fuher & Villwock upon this note until it is fully paid.

II.

As to the accounting between the Buckeye Supply Co. and Fuher & Villwock, I do not find—aside from the question as to the liens, which will be considered hereafter—that there are but two matters disputed on the stipulation.

1. The first of these is the Hovis claim. So far as this is concerned, I find, upon the testimony, as it is before me, that it was an expenditure in an unsuccessful effort, denominated by the witnesses as “fishing” for lost tubing. It was unsuccessful, but, nevertheless, I hold, upon all the testimony, that it was a proper expenditure, and that the Supply Company should be allowed that in their account in proper form.

2. The interest upon the \$660 credit seems to be clear, and upon the testimony of Mr. Hardee to be correctly given as to the date of payment. He testified that he took the note dated July 11th, without interest, at three months, and no interest was received on it until October 10th following, therefore that should be a credit.

III.

1. The reply of the plaintiff, John Fuher, substantially admits, I think, all that I have above found, except as to the correctness of the Hovis claim, which it does dispute; but it sets up in reference to the lien claimed, that the lien has been lost to the Supply Company by a failure to re-file the mortgage. And it is further claimed in argument—although I hardly find it claimed in the pleadings and I think the pleadings are hardly consistent with the claim. (I may say, in passing, that so far as this kind of cases are concerned the court will undertake to blaze its way through without considering itself exactly bound by the pleadings—and that is what the court did in the 8th circuit court report—and authority was found for it in the 12 O. S., particularly, the court should try to do equity between the parties, and if it finds that the attorneys have made a mistake by alleging some that turns out not to be true, or failing to find something that may be true, the court will not be so very particular about it if it finds it can do justice otherwise.) Now, as to this, I have already found that Hardee, for the Buckeye Supply Co., took all the possession of this property of which the company in its nature was capable, and the filing, for the re-filing of the mortgage is a matter of no consequence whatever. I do not think that that argument can be taken as entirely decisive. We all know that it is a constant practice to take chattel mortgages and go and file them and immediately thereafter take possession. It is a sort of a double protection and

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amounts to nothing if they take possession. So far as this case is concerned it would be a double protection and the failure to re-file it, I do not think cuts any figure at all, or affects the rights of the parties.

2. That the trust, so far as there was any trust here, was in Mr. Hardee, for the benefit of the Buckeye Supply Co., and not a trust for the benefit of any other creditor. Whether or not that could have been attacked under sec. 643 at the time, or not, is not important to inquire; it was not attacked under that section, and I think it should be treated as though the transfer order had been to the Buckeye Supply Co.

IV.

So far as the creditors are concerned, perhaps I have said enough to show that it would follow that neither Brumback nor Wentworth had any claim as against the Buckeye Supply Co. to priority or to distribution from any money received from the Fuher & Villwock interest until the \$7,000 debt to that company is paid in full. The judgment is good as against any interest that Fuher & Villwock, or either of them, might have upon any surplus, if there were any surplus after the payment of the debt of Fuher & Villwock against the Buckeye Supply Co., but they could not interfere with the claim of the Buckeye Supply Co.

V.

The claim of Mrs. Fuher has given me some difficulty, I confess. Her claim is a claim for royalty and was not originally a claim good against Fuher & Villwock. As between her and Fuher & Villwock, I have no doubt that she has an equity in the nature of a royalty upon the production of this leasehold interest. The difficulty about the matter is, that she has allowed her husband (a natural thing to do, of course, but still it should be treated in law the same as though she had allowed somebody else) she has allowed her husband to attend to all her interest; he so testifies himself, and she has allowed him to act for her, and while that would be a natural confidence between husband and wife, his act binds her just the same as though he were a stranger or another individual. At the time when he made his assignment—that is, when he gave the mortgage and made his transfer order to the Buckeye Supply Co. and to Mr. Hardee—he made no reservation of this royalty; he did not, so far as his own testimony shows, mention the subject at all at that time. Mr. Hardee testifies directly (and I have their testimony written out and have referred to it and read it over very carefully) that nothing was said about it. Neither of them claim that anything was said about it until afterwards. Mr. Hardee admits that sometime subsequent to that, Mr. Fuher did mention the fact of this royalty and said something about it; and Mr. Fuher so testifies, but this was subsequent to the vesting of the interest. Whatever it was, it was subject to the vesting of the interest of the Buckeye Supply Co. and could not affect the original rights in it. As against Fuher & Villwock, she would have a claim to this royalty; but I hold that by virtue of her permission of her husband to act for her and by reason of his acts, she is now estopped, as against the Buckeye Supply Co. from asserting any claim as to this royalty in prejudice of their rights. I think she would have a right prior to that of other creditors, if there were anything left—because hers is an equitable right—one that she could have protected if she had seen fit to protect it and the estoppel would not act as against the other creditors.

This disposes, I think, substantially of the matters in reference to the Fuher & Villwock partnership property, and it does not seem to me that there is very much trouble about any of these matters; or, I may say, more properly, perhaps, that I am clear in my own mind as to the conclusions that I have drawn thus far.

VI.

Next we come to the Fuher, Villwock and Leshner matter, under which more questions arise, both of fact and of law—principally of law.

The first matter to be disposed of is the demurrer filed by the Buckeye Supply Co. to the answer of Mr. Leshner. The ground insisted upon is that it is a misjoinder and not necessary to dispose of in order to settle the partnership matters of Fuher and Leshner, it being conceded that the Fuher, Villwock and Leshner matter was not a partnership, but a tenancy in common.

This demurrer was filed March 25, 1895, to the answer and cross-petition of Aaron Leshner. The Buckeye Supply Co., however, upon May 12, 1894—nearly a year before this time—had filed its answer and cross-petition, in which, in paragraph 6th, they bring under review this very Leshner matter and set up the \$534 claim to be paid out of that, and, as I hold, they, before filing the demurrer, had themselves made it necessary to investigate and determine the Leshner matter. By this paragraph 6 and by Exhibit A, which was attached, in which they account for an interest in the Leshner property, as to the Graham lease; and also in Exhibit B they transfer the accounting to Exhibit B, they take to themselves an interest to maintain here and credit money received from the Graham lease. So I overrule the demurrer, and the answer, which is presented here to be filed, I consider as filed.

VII.

So far as the accounting between Leshner and the Buckeye Supply Co., upon this answer—which I consider as filed—no question has been made, and there is nothing for the court to do, and nothing for the parties to do except to settle their accounts.

VIII.

An accounting is necessary between Leshner and Fuher & Villwock, and between Fuher and Leshner and Villwock and between Villwock and Leshner and Fuher; an accounting not as between partners, but as between tenants in common.

A good deal of evidence has been given upon the items of this account, but counsel, I think have agreed, or will agree, upon everything except the one item of \$150, Mr. Leshner having credited Mr. Fuher with having paid \$75 to a man by the name of Caldwell, and Caldwell's testimony shows clearly that Mr. Fuher paid \$150. I find that Mr. Fuher should have credit for \$150, instead of \$75, and I see nothing further for the court to do in reference to the accounting between these parties.

IX.

We come now to the accounting of the Buckeye Supply Co. on the Graham lease. It is perhaps important that I should look a little closely at this matter both upon the pleadings and upon the evidence, and

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also upon the law. I will not go at large into the pleadings; but, so far as the Buckeye Supply Co. is concerned, it has now in here three answers and cross-petitions, each of which bears upon the question of this accounting—not only the last one, just filed, but the other two. Paragraph 6 of the original answer of May 12th, on page 5, sets up as follows: "These defendants further aver that at said date of February 10, 1891, said John Fuher and Charles Villwock, as such partners, were indebted to said The Buckeye Supply Co. in the further sum of \$534.84, with interest from January 1, 1891, on an account for goods, wares and merchandise theretofore sold and delivered by said The Buckeye Supply Co. to the said firm of Fuher, Villwock and Leshner, to be used on said Graham farm in the improvement and operation of the said oil wells thereon, being one-half of the total amount of said account, the other half thereof having been paid by said Leshner on or about January 11, 1891."

"These defendants further allege that on or about February 11, 1891, the firm of Fuher & Villwock, Charles Villwock and John Fuher, executed and delivered to said William Hardee, as trustee, an instrument in writing, by which they duly assigned and transferred to said William Hardee, all their interest in all the oil wells in the petition described, and all the oil then being run, or thereafter to be run, from said several oil wells to which said firm of Fuher & Villwock and said Fuher and Villwock, or either of them, would otherwise be entitled; and aver that it was then and there agreed that, as such trustee, said William Hardee should enter into possession and control of all the said wells, property and interests so conveyed and transferred by said Fuher and Villwock in and by said chattel mortgage and said transfer order and receive all the oil then being run, or thereafter to be run, from said wells and interests; and that he should make monthly sales of said oil, and after paying each month the expenses of operating and caring for said wells and interests and for materials and labor in making repairs that should be deemed necessary, the balance of said proceeds should be applied towards the payment of the said amounts then owing by said Fuher and Villwock to said The Buckeye Supply Co. until the amount thereof, with interest, should be fully paid.

"And these defendants further aver that in pursuance of said agreements and contracts, the said property and interests, since the making of said contracts, have been in the possession of said William Hardee, as such trustee, and with the advice and co-operation of said Fuher and Villwock said wells and interests therein have been by him operated, and the oil so run from said wells has been by him sold and the proceeds thereof have been by him received and applied in payment of the amounts accruing, etc." And it then refers to Exhibits A and B attached and made a part hereof. It then proceeds: "the net proceeds received from the sale of oil so run from said wells on said Graham farm being applied first in payment of said account of \$534.84 and interest thereon, as shown in said Exhibit A, and after full payment of said account and interest, said net proceeds from the well on said Graham farm and the entire net proceeds of oil from all other of said wells being applied towards the payment of said note and interest thereon, as set forth in said Exhibit B."

That is alleging, in substance, that it was assigned as security for the \$534 that they have applied it as in Exhibit A, which shows the \$534 paid, and a balance over of \$5.70, and then that they have applied the balance on Exhibit B. And Exhibit B affirms that fact, being a

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transfer of the balance, which they make as \$8.57—but that makes no difference—they transfer that balance to Exhibit B and thereafter run it as shown in Exhibit B. This shows what they did, and by a supplemental answer, filed about the time of the hearing of this case, April 18, 1895, they bring that account down to the present time; and, by their new answer, now filed, they account for one-half, the Leshner half interest in that, and apply it upon the Leshner debt, leaving the question now, so far as their pleadings are concerned, simply with the allegation that they have applied it, without showing any contract giving them a right to apply it.

They alleged that they had an assignment, but they themselves alleged that that assignment was to secure the \$584. Now the pleadings of course are referred to in reference to this. The petition indicates, confessedly, a mistake, so far as this matter is concerned. I don't know that I need to call attention to that. But it is true, perhaps, as Mr. Harris has suggested, that in the seventh clause of their answer they allege this—after stating the balance that is due to them upon the \$7,000 note, which would be \$2,542.26, they say: "which said sum, by reason of said chattel mortgage and said transfer order and said agreements hereinbefore set forth, is the first and best lien upon all of said property and wells included and described in said chattel mortgage and said transfer order and upon all oil that shall be run from said several oil wells after payment of said expenses of operation, etc." But that is simply a legal conclusion, and therefore does not, I think, amount to the setting up of a claim to this surplus.

But the reply, filed by Mr. Brumback, on behalf of the plaintiff, to this, is somewhat singular, and gave me a little trouble at first to know what it denied. It reads as follows:

"Plaintiff further admits that on or about the eleventh day of February, 1891, the said firm of Fuher & Villwock duly transferred to the said William Hardee, as trustee, their interest in all the oil wells in the petition described, and all the oil then being run or thereafter to be run, to which the said firm of Fuher & Villwock, or either of them, would be entitled: and admits that the said William Hardee was authorized to take possession and control of the said wells and property and interest so conveyed and transferred, and receive all oil therefrom and make monthly sales thereof. And after paying the expenses of operating and caring for said wells, and repairs thereon, plaintiff admits that the balance of said proceeds was to be applied towards the payment of certain indebtedness of Fuher & Villwock. But said indebtedness so to be paid out of said oil proceeds, was not, as alleged by said William Hardee and the Buckeye Supply Co., but was as follows, to wit: That all proceeds of oil run from the wells covered by the said chattel mortgage should be used toward the payment of the note and interest thereon secured thereby, so long as the same was a lien thereon; and the oil run from the wells on the said Graham farm should be used towards paying the said indebtedness of \$584.84 and interest thereon."

So far as that is concerned, it may be taken, perhaps, to be a denial, although there is a direct allegation in it that they were to receive all of the oil for payment of the debts; still, it winds up with a denial, and all I can say is that perhaps it makes the honors easy as between the parties as far as the pleadings are concerned, and I must decide the matter upon the testimony, not believing that in a case of this kind it is necessary to treat the pleadings as if actually binding upon anybody and everybody,

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but thinking it to be my duty to look at the evidence and see what the evidence shows.

The Graham lease is not described, as I understand it. I do not know the description and of course I take the word of the attorneys, but I do not understand that it is claimed that the Graham lease property is described at all in the Fuher & Villwock \$7,000 mortgage.

Mr. Hardee testifies, on page 42 of the testimony, that the account as now filed by him represents everything received by him upon all the property upon both claims. On page 43—without stopping to read it—he says there was nothing to be accounted for—nothing had been received, except what was in the account. Mr. Fuher was examined—page 27 testimony—in reference to the question as to whether at the time—February, 1891—there was any agreement, in writing or verbally in reference to the application of the surplus proceeds of the Graham lease, after the payment of the \$534. On page 27 he says there was no writing and nothing was said about it. I will not stop to read it, because I don't want to take the time; I have examined it carefully, and counsel, of course, can see whether I am right or not in my deductions from the testimony. On page 30 he was cross examined very closely and fully, as to this, and there is a great deal that he does not remember about. That is principally the result of his cross-examination—he don't remember that anything was said, and he don't remember that anything was written; but he does not take back what he said in direct examination: that there was nothing said and nothing written, only he is a little frightened, perhaps, by the cross-examination and his memory is impaired by it. On page 31, it was taken up by his counsel and he was re-examined, and again his recollection is better and fresher than on cross-examination. But Mr. Hardee himself upon his examination, when the question was put to him, by Mr. Harris, does not assert that there was anything said or anything written aside from the mortgage and the transfer order, and, laying aside entirely the pleadings in the case and their construction—I cannot find testimony in the case where he shows any right to this surplus over and above the \$534 from the Fuher & Villwock interest as tenants in common, and not as partners—and this matter of tenants in common cuts a very important figure in determining the remaining questions in the case—that he does not assert or prove any right to hold this surplus and apply it upon the \$7,000 claim—except that he has done so.

What the amount is that has been received prior to December, 1891, Exhibit A. states, but what amount has been received by Hardy, or by the Buckeye Supply Co. from the proceeds of the Graham-Lesher leasehold interest, since that time does not appear, and there is no way, of course, that the court can determine anything about it. That should be furnished. I have considered the Buckeye Supply Co. as a party. Exhibit A. shows exactly how the thing was gotten up, and from that time down to the present time, the Buckeye Supply Co. and Mr. Hardy should account.

The question now remains, as a matter of law, what shall be done with the money when they do account? They have got the money. There might be circumstances under which they would be entitled to hold the money, without any agreement. Of course there is a right to off-set. There is this difficulty about that, however; their \$7,000 claim is a claim against the partnership of Fuher & Villwock. The money

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that has been received has been received in another capacity; although belonging to the same parties, not belonging to them in the same right, and therefore the principle of set-off technically does not apply.

The first question, then, as it seems to me, is, What are the rights of Mr. Leshner, if any, in the interest of Fuher and in the interest of Villwock, as tenants in common? I suppose it is clear that upon an accounting between the parties, Mr. Leshner would have a balance against Mr. Villwock, as tenants in common, and Mr. Fuher would have a balance against Mr. Villwock. I don't understand that Mr. Leshner would have any balance as against Mr. Fuher, and I don't understand it to be claimed that he would have a balance against Mr. Fuher; and the first question of law is as to his right to have that balance paid out of Mr. Villwock's interest as a tenant in common—not being partners, but as tenants in common, in the Graham lease.

The question of the rights of tenants in common is one that has been running through the courts from the time when the memory of man runneth not to the contrary down to the present time, and when we apply the principles of tenancy in common in this transaction, as it is done in late cases in Ohio, we must look at our own statutes, because we have a statute fixing this matter. Section 5774 is as follows:

"One tenant in common, or coparcener, may recover from another his share of rents and profits received by such tenant in common or coparcener from the estate." And now here comes in a clause that is new—that is not in the English statute, which ran away back, and which was not in our statute, I think, originally, but which has been in a good many years now: "according to the justice and equity of the case." And that has been frequently referred to in our Supreme Court and construed. It was directly construed in *West v. Weyer*, 46 O. S., 66, 73. It is not important but refers specially to this clause and shows the history of the statute upon this subject. Now you will find this rule set forth in *Clark v. Lindsey*, 47 O. S., 437, in the opinion of Judge Dickman, page 442, you will find a sort of a review and statement of the rights and duties of tenants in common. And it holds them to very strict obligations in equity and good conscience between them; they must neither do nor allow anything to be done to the injury of their co-tenants. I find there an application of these principles. To apply those principles to this case, Mr. Villwock had no power to make any assignment or transfer of any interest that he had or might have in the property, to the prejudice of his co-tenants, and if he had made a direct assignment of his interest in that lease, to the Buckeye Supply Co., for this surplus, they having knowledge of the fact that they were tenants in common, there and that he might have rights, I think they could not have held it against him. There is a case in Ohio where, under very similar circumstances, a mortgage had been made to a bank, to borrow money, where there was an interest of that kind in the property, but where it was unknown to the bank and there was nothing on record to give them any notice whatever that there was that interest, and it was held that they might hold it as bona fide purchasers; but, so far as this case is concerned, I do not think they could have held it, if it was made; and, in the second place, I do not find that it was made then, the conclusion I reach would be—if upon a statement of this account there is a balance due, as a co-tenant, from Mr. Villwock to Mr. Leshner, and there is a balance or surplus of proceeds from those wells, Mr. Leshner has an

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equity or claim to be reimbursed in the statement of account for that amount, and I so hold.

Mr. Brumback: I suppose that same doctrine holds true of Mr. Fuher, if there is money due him?

The Court: Yes, the same principle holds.

Mr. Harris: Does that apply to Fuher & Villwock?

Mr. Brumback: Yes, certainly; they are tenants in common.

The court: Well, I have not thought of that, one way or the other. I give you the reference that I have to these authorities and state the principle as I understand it.

Mr. Brumback: When the court says this applies as between tenants in common, it must apply to Leshner.

Mr. Harris: This last point I don't quite understand: You say that Mr. Leshner has a right to reimburse the amount that Mr. Villwock may owe him—reimbursed to the extent simply of what may be found to be the interest of Mr. Villwock in this surplus?

The Court: Yes, sir. Now the principle is this: Here is a certain interest which is held in common; that interest is a creature of the investment made by the tenants in common. Now the tenants in common, whoever has contributed, or whatever has been contributed, have the right to be made, as between themselves, whole, each as to each.

Mr. Harris: The same as a partnership.

The Court: In that respect it is somewhat akin to a partnership, but it is not a partnership. Here is a fund that has been created, and the parties who have created it are entitled to have the benefit of it as between themselves, and it should be adjusted so as to give it to them. The remainder of this surplus—whether it belongs to Fuher or Villwock, would belong to their creditors—*not* as partnership credits, but because each of them is liable for the whole of the partnership liabilities and the debt to the Buckeye Supply Co. is a partnership debt.

But there has nothing been said about Mr. Brumback's claim, whether that is a partnership debt or not, but Fuher and Villwock are each of them liable for whatever either of them has that may be reached by the creditors. I have held already that the Buckeye Supply Co. was not entitled to set off its debt, because it is in a different right—in a different capacity; but as creditors they have the right and the other creditors have the right, and the only question remaining is whether by virtue of any of the proceedings of the creditors they by any diligence have got a right superior to the right of the Buckeye Supply Co. So far as this surplus is concerned, when you have disposed of the interests of the co-tenants and made that equal all around, they might have taken an assignment from Fuher and Villwock, or either of them, of any interest that either or both of them had in this property; that is, Mr. Fuher might have assigned his interest, or Mr. Villwock might have assigned his interest, and they could have held it. But I do not find that either of them did make an assignment as to this surplus.

It is said by the attorneys on the part of the Buckeye Supply Co. that no attack has been made upon the Buckeye Supply Co. and that therefore the Buckeye Supply Co. is not bound to account to these creditors—I think Mr. Harris said they were simply creditors, nothing more and nothing less. Now then, so far as their cross-petitions are concerned, they, perhaps, might be criticised—I think they are a little weak. Mr. Brumback, in his original petition, simply sets up that he has a judgment. The only way they could reach them is under sec. 5464, Rev. Stat. I

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don't know of any other way—by a creditor's bill. That creditor's bill requires certain allegations. Mr. Brumback, in his petition, did not make any attack upon anybody. He comes in when the answer is filed, and in a reply to that answer, he does make an attack with all the vigor that is necessary—if it is in time—upon their right to hold this surplus. Now he claims that they ought to account to the creditors for the whole thing. But I hold against him on that. But, so far as this surplus is concerned, I think his claim to that extent may be held to be good. The fact is that the claim is too broad, and if I should undertake to apply that rule to him, it would hit pretty generally.

The Wentworth claim, while it does not attack directly in the answer and cross-petition, the Buckeye Supply Co., it does make an allegation which I think perhaps sufficient; it says that there is an interest in this claim which ought to be applied to the debt, which I think, by throwing the mantle of charity over the pleading, is sufficient; and, in the conclusion, which I have arrived at with some difficulty, I think I am borne out by the eighth circuit court decision. They have used some diligence, and the Buckeye Supply Co. have not used any diligence, and, holding that they have no right to keep the money as a set-off, I hold that if there is any surplus when you get down to the Wentworth claim and the Brumback claim, they are ahead of the Buckeye Supply Co.

Mr. Harris: That is, as to the surplus that comes from the Graham farm?

The Court: Yes.

Mr. Harris: That is, after settling the matter between Leshner and Villwock?

The Court: Yes.

Mr. Brumback: After settling the \$534 claim?

The Court: That is settled. Now I have summed up the result here and will give it to you briefly:

1. The Buckeye Supply Co. are entitled to hold and apply on its \$7,000 note all the net proceeds of the Fuher & Villwock property.

2. In the accounting the Buckeye Supply Co. may be allowed the Hovis \$250; and the interest on the \$660 may stand as it now stands in the account.

3. The Brumback and Wentworth judgments have no standing as against the Buckeye Supply Co., in the Fuher & Villwock property.

4. Mrs. Fuher is estopped from setting up any claim to royalty as against the Buckeye Supply Co.

5. The demurrer of the Buckeye Supply Co. to the Leshner cross-petition is overruled and the prepared answer filed.

6. Leshner and the Buckeye Supply Co. shall account as between themselves and Mr. Leshner's one-half of the proceeds of the Graham property will be applied upon the \$1,500 debt until it is paid.

7. The Leshner, Fuher and Villwock account to be taken between them as tenants in common; and, in taking that account, Mr. Fuher to be allowed \$150 which is in dispute.

8. The Buckeye Supply Co. must account for surplus oil from the Fuher & Villwock interest as tenants in common in the Graham lease, over and above the \$534, which they retain.

9. Leshner will be first made good out of the surplus, if any, that may be due him from Villwock. The B. S. Co. could apply whatever is due to Leshner upon its \$1,500 debt until it is satisfied.

10. Brumback and Wentworth to come in next for any remaining interest, if any, of Fuher & Villwock in the surplus from the Graham lease, and if there is anything left, the Buckeye Supply Co. will get it. The B. S. Co. could apply anything due to Fuher on the accounting between the co-tenant after Brumback & Wentworth was satisfied.

11. A special master commissioner will be appointed to make the sale and carry out the order.

JOURNAL ENTRIES—CORRECTING RECORD.

[Lucas Common Pleas, May 2, 1889.]

FIRST NATIONAL BANK OF TOLEDO V. JOHN FITCH ET AL.

STATEMENT OF FACTS.

Where a judgment or order is in fact rendered in the circuit court in 1882 and a mandate issued to the common pleas court to immediately put such judgment or order into execution, but which is not entered in the journal by the clerk of the common pleas, and several years later in 1887 after the first mandate has been obeyed by the common pleas another mandate is entered upon the journal bearing the same date as the first; upon motion to correct the date of such journal entry, held.

1. Section 5239 Rev. Stat., which provides that the clerk of the common pleas court shall upon receipt of a certified transcript from the circuit court immediately enter the same upon the journal, is directory and not mandatory, and that all the proceedings, and not the journal entries, are the record of the case.
2. The court will not correct such journal entry, when it appears that the mandate as made was carried out by ordering sales of land by sheriff, which sales were made and approved by the court and that complainant's rights have not been prejudiced thereby, while purchasers at the sheriff's sale who have made improvements would be injured altering the entry.

LEMMON, J.

A motion was submitted, some weeks ago, in the case of The First National Bank of Toledo v. John Fitch et al., which has been considered by the court, and we have come to a conclusion, which we will now announce.

The motion in this case is one to obtain an order of the court changing the date of a journal entry which had been made upon the journal of the court, giving, as is alleged, an incorrect date to certain memoranda in connection with the return of the case from the district court to the court of common pleas, by mandate.

In support of this motion, it is alleged that the date upon the journal of the court affixed to the mandate which was returned from the district court to the court of common pleas, of April 4, 1882, was incorrect, in this: that no mandate was in fact made out in 1882, or in April, 1882, but that a mandate, in the year 1887—long after these sales had been made under the orders of sale issued in the court of common pleas to the sheriff and returned by him and examined by the court of common pleas, and which had resulted in the sale of a vast amount of property to different persons, and after these sales had been confirmed and deeds made—that then this entry had been made, and a mandate in fact had been made out, and the mandate after being made out, an entry of the same was made upon the journal of the court, so that it is alleged to have not been

the mandate of the court of 1882, but the mandate of the court of July, 1887.

And it is said in support of this motion, that it is the duty and should be one of the objects of a court to have its records speak the truth, and if it is found here that a record has been made by the clerk, or by any one, which falsely dates the transactions of the court, the court should require, on being notified of the fact, the correction of its records. It is said to be the duty of the court to make its officers and its records perform their truthful duty.

Now, with all this, the court here agrees fully. We have no doubts, and we should take pleasure in correcting any mistake whatever which presents in a false light the facts, if that were all there was of it; and this, perhaps, would not be contested by any one who is interested in the motion now being decided.

But, on the other hand, it is said that the correction of these dates at this time, should not be made, unless the making of the correction will work no harm or injustice to other persons. It is alleged that the purchasers at these several sales of this property are not parties to this proceeding that these persons who are to be affected by the allowance of the motion which the court is asked to grant have not had service. These persons have been induced in times past, (it is true under the rule of *caveat emptor*,) but still they have been encouraged to buy. The officer of this court has published as for sale certain property and sales have been made and those persons who have made these purchases have paid their money, deeds have been made and they have gone into possession and gone on and made improvements, and it is alleged that these things have been going on for a considerable time, those parties trusting in these proceedings, not being represented, and that the consequences to them would be disastrous, and it is contended therefore that these parties are not in a position to ask this court to change its records in such a way as to affect the interests of those parties who have in good faith paid down their money upon these purchases.

This whole question rests upon the construction of certain statutes which refer to cases remanded from the district court to the common pleas court. Section 549 Rev. Stat., contains the general provision on this subject, and reads as follows:

"The Supreme Court or district court may remand its final decrees, judgments, or orders, in cases brought before it on error or appeal, to the court below, for the specific or general execution thereof, as the case may require, and may also remand causes which so come before it to the inferior courts for further proceedings therein."

This is the statute giving the general power, without specifying particularly the manner of carrying this power into execution. It is general in its language. It gives power to remand a case for execution. It says "the Supreme Court or district court may remand its final decrees, judgments, or orders, in cases brought before it," etc., as we have read.

There is another section which is much more particular. We have not looked up the history of these statutes, that is, we have not examined the manner in which the statutes were changed from time to time, ultimately in sec. 5239, which reads as follows:

"When the circuit court makes a final order, or renders a final judgment, in cases brought before it on appeal, it may enforce the same by process issued therefrom or may remand the same to the common pleas

court for execution or other process; the clerk of the circuit court shall certify the same to the common pleas court and the clerk of the common pleas court, on receipt of the certified transcript, shall immediately enter the same on the journal; and the judgment or order so entered, unless otherwise directed by the circuit court, shall, for the purpose of execution and other process, stand as the judgment of the common pleas court."

The language of this statute is peculiar. We were struck with the peculiar phraseology, which, in the closing words of the statute, declares the effect of a journal entry. It says "and the judgment or order so entered, unless otherwise directed by the circuit court, shall, for the purpose of execution, and other process, stand as the judgment of the common pleas court." Very frequently, words placed in such a connection will be held, and perhaps generally will be held to express a limitation of the statute to the cases there named, or, in other words, they will be held to express the contrary of that which does not come within the peculiar language of the statute; and, in this case, if that construction were adopted, it would, in substance, read "And the judgment so entered, unless otherwise directed by the circuit court, shall, for the purposes of execution and other process stand as the judgment of the court of common pleas, and the judgments not so entered, shall not.

Now, is that the meaning of this statute? In other words, is the statute in reference to the entry of this mandate which comes from the circuit court—is that statute mandatory, or is it directory?

That brings us to the consideration of the nature of this entry and the object to be accomplished by it. Ordinarily, and I think very generally, in Ohio, it is held that where an act is prescribed by either the constitution or by the statute, and it has for its purpose the securing of some important matter, which is subserved by the very form of the constitution or of the statute, there our Supreme Court will hold it to be mandatory—because the statute was made for that very purpose, or the constitutional provision is brought out to accomplish that purpose, and that alone. But in other cases, where it does not seem to be of the same importance—where it is not of the very essence of the matter, not subserving an important purpose of the constitution or of the statute, it will be held to be a matter of less consequence and to be directory only.

This method of construction has been adopted and applied so generally by our Supreme Court that it has come to be a subject with which the courts and the bar are quite familiar. It is elementary.

Let us look at this statute, then, in that light. Is it true that the action of the court can only be shown by its journals? That has frequently been said. We find it in many decisions; yet, is it in fact true? Suppose the journal itself were destroyed, burned up, then may the judgment not be shown? It may be, unquestionably. Secondary evidence must be resorted to, by necessity, in such cases.

Again. Suppose a judgment had been pronounced by a court, and the clerk, through neglect or wrong, has failed to enter it upon the journals of the court. We have one instance in Ohio where a judgment should have been entered upon a verdict, but was not entered, and the Supreme Court held it to be a matter not of discretion; but, by mandamus, compelled the entering up of that judgment. And, in a case from Elyria, the justice of the peace had announced his decision—there not being a jury—and after he had announced it, he was persuaded by one

of the parties against whom the decision went, to change his finding of the matter and he afterwards entered up this changed judgment. The Supreme Court compelled him to correct that judgment and held that the judgment of the court was the judgment actually pronounced and that the entering of the judgment was a mere clerical act. I cannot give you at this moment, the name of that case, but I had it before me sometime ago and my memory is distinct in reference to it. And that settles this question: that the action of the court—while it is ordinarily evidenced by the journals of the court—and always should be—yet the action of the court is a thing distinct from the journals and from the record.

Upon this subject, the Supreme Court uses this language, in the case of *Edward Newman's Lessees v. Cincinnati*, 18 O., 323 and 330: "This does not seem to be questioned," (speaking of the return of the sheriff) "nor is it questioned that publication was made, but it is claimed that this mode of giving notice should be preceded by an order of court. In a record, where the fact is found by the court that publication was made, I should not hesitate, where the attempt is made to impeach the judgment or decree collaterally, to presume that the necessary order had been made. But no presumption is necessary in the case under consideration. It appears from the bill of exceptions that at the March term, 1817, an order for publication was made. It is objected, however, that in this order there was a mistake in the name of the defendant. But if there be any force in this objection, it is removed by a subsequent order for publication, made at the November term, 1817, where there is no mistake as to the name. This order was not carried into the complete record of the judgment, and therefore it is claimed that it cannot now be adduced in evidence. The fact that the clerk did not perform his entire duty in making up the record cannot deprive parties of their rights. Even although he should entirely fail to make up a record, such neglect would not effect those interested in the matter decided, if sufficient could be found upon the files and books of the court to show what had been done. What we call the complete record in a case, is nothing but a history of what has been done in the case, copied by the clerk into a book called the book of records. It is not the writing of those things in this book which gives them validity. It is the previous action of the court upon the subject-matter. The record is but evidence of this action, and if in copying, the clerk makes a mistake, that mistake will be corrected by entries made from time to time of the action of the court, and which entries made in other books of the court, lay the foundation for the complete records."

Now this brings me to the consideration of the question—not necessarily whether this mandate which was entered in 1887 was correctly or incorrectly dated; we have no doubt on that. We announced to counsel at once, upon the trial of the case, that the evidence satisfied the court that we were convinced that the mandate which was in fact entered upon the journal of this court in 1887 was not made out in April, 1882—we were fully convinced of that. We were fully convinced also of another thing: that a mandate was made out in 1882, at some time in the spring of that year, probably; or, at least before 1884 and that being made out—it was made out before these proceedings had resulted in the sale of this property. We were quite satisfied of that from the testimony, particularly that of Mr. Lenderson. Now, whilst the testimony of Mr. Quiggle, the clerk, is entitled to some consideration, we feel that it is so easy a matter for him to be mistaken, that much significance

should not be given to his unaided memory. But, when we come to the consideration of the testimony of Mr. Lenderson we find ourselves confronted with facts which bring us to the necessity of holding one of two things: either that Mr. Lenderson swears falsely—knowingly, or else a mandate was made out and was among the papers—the mandate of the district court to the court of common pleas in order to empower the court of common pleas to carry the judgment of the district court into execution, and that this was among the papers of the case when he examined them in, perhaps, August, 1884. Being satisfied of that—because we take it in this community where Mr. Lenderson has been known so many years, it would scarcely be permitted to be discussed, perhaps, as to whether he would, after having made this memorandum and testifying with the memorandum before him, swearing that that memorandum was made and was with the papers before him, in 1884, and that memorandum fully confirming what he said, I take it there would be very few persons to be found in this community who would hesitate to say that that was the truth, and we therefore find accordingly—that it is the truth. There was a mandate made out.

Now we are brought to the consideration of the question, whether, the mandate being made out, the mandate from the district court which informed this court, commanded this court, authorized this court to carry that judgment into execution, that mandate not being entered upon the journal of the court of common pleas, however, as this statute requires it should be; this statute being “and the clerk of that court (common pleas) on receipt of the certified transcript, shall immediately enter the same on the journal; and the judgment or order so entered, unless otherwise directed by the district court, shall, for the purpose of execution and other process, stand as the judgment of the court of common pleas”—will that stand as the judgment of the court of common pleas sufficiently to sustain the orders of sale which were issued by the court of common pleas upon which the sales were made, the proceedings of the sheriff examined and confirmed by the court of common pleas and deeds ordered for those purposes, will the mandate which came from the district court authorizing and commanding this court to carry out that judgment, and showing what the judgment of the district court was, will that be sufficient, not entered upon the journal? The statute says, “And the judgment or order so entered.” Now, the purpose of this statute was, doubtless, to have that mandate and the judgment which is evidenced, the order, the thing to be done, the execution of the judgment as well as the judgment itself, to be clearly given to the court and under the control of the court. It is there, in the form of a mandate. The mandate—as explained by Mr. Lenderson (who gave more evidence of knowledge of what a mandate is than the court expected a witness not learned in the law to be able to give, and we were surprised at the familiarity which he showed with the contents of the mandate and his statement of what this mandate must have contained: his knowledge of it seemed to be full). He said that the mandate which he saw he read and read particularly and it was marked with a red cross in the margin of his memorandum, and that brought to his mind that he had examined that mandate of the district court with special care. He does not aver what it contained, but he says if it had not contained these requisite things, his attention would have been called to it, and we can well understand this, if he understood the importance and the form and substance necessary in a mandate.

This, then in the testimony of Mr. Lenderson, and it satisfied the court not only that a mandate was made out, but that the mandate was a mandate and that it gave information to the court of common pleas of the judgment of the district court of its order, judgment and finding, and in fact was a mandate in form.

Now, did this sufficiently inform the court of common pleas to enable this court now hearing this motion to say that no portion of the purpose which that statute contains is left to uncertainty and to not be carried out properly by reason of this neglect. Is there any injury to come to any party because of this requirement that it shall be entered upon the journal of the court of common pleas not having been complied with? To what extent is that injurious to the parties? Is it injurious to such an extent that it may be fairly held to be in violation of the purpose of the statute? Is any very serious interest secured by it? It must be remembered that the final record of the court which is made up carries into it copies of the papers that are issued; the pleadings, the process of the court, the orders of sale and the returns of sale, all go into the final record. The final record, if it were made up only from the journal entries being brought together, then one conclusion might be different—it might be very well held then to be the purpose of the legislature to have the journal entry made so that the record should be full, as a collection of the journal entries, but the final record is much more than the journal entries: it carries the processes of the court, the pleadings and the returns of the officers of the court upon it and it carries upon it those very orders of sale issued by the court of common pleas in pursuance of the mandate. It carries the return of the sheriff and it carries the order of the court declaring that it has examined the proceedings of the sheriff and found them in every way regular in accordance with law, and confirming them. It carries all that is to be found in a complete record. Can it be held that the statute requires that it shall be construed as mandatory? We think not. We think, the fact being proved to the satisfaction of the court that the mandate was in fact made out—not only that a judgment was rendered by the district court, but that a mandate was made out by the clerk of the district court; that it was placed somewhere (that Mr. Lenderson found it there is no doubt), and, upon this subject, we are confronted with this class of facts; the same person who is the clerk of the common pleas is the clerk of the district court; the records of the two courts are kept separately but in the same office and by the same person. The mandate was made out. It did not appear clearly where that mandate was found; but it was found while searching for and looking up the title to certain lots which had been sold under one of these orders of sale. It was found, doubtless, among the papers that Mr. Lenderson examined. It may be held to be a little too uncertain whether he got hold of the papers in the boxes which contained the papers of the district court or the papers of the common pleas. It does not make any difference. It has been held by our Supreme Court that a paper is filed in the clerk's office that is shoved under the door after the clerk's office is locked. It certainly would be a sufficient filing if it were handed to the clerk and by the clerk, through mistake or carelessness, put into the wrong box. Now suppose that these papers were in the district court box, or with the district court papers, what difference does that make, if they were in the clerk's office? There is but one clerk. The same person who is clerk of the court of common pleas is, by virtue of his office, clerk of the district court, and the

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office is the same. The papers are simply kept in different packages. It was all under the control of the same clerk. It was among the papers of the case and where a person would find it who was examining a title, as Mr. Lenderson found it, and we think this ought to be held a substantial compliance with the requirements of the statutes so far as not to make the proceedings defective, to the extent of destroying the title which the parties who purchased at sales otherwise regular in every respect—and so pronounced by the court—particularly after this lapse of time, in a city growing and changing as Toledo is, where improvements are going on and assessments and taxes being paid; we think that after this lapse of time the court ought to hold, in a case of this kind, in consideration of all the equities of the case, Mrs. Maginnis herself being a party to the issue of these orders of sale in the common pleas under precipes signed by her attorneys, put in evidence before the court; moving at times to set aside sales, receiving money which had been made under these sales, we think she ought to be held under these circumstances, estopped from setting up this little matter that so little affected her interests and where the substantial purposes of the statute have been complied with and carried out; under all the circumstances, we think this motion should be denied.

Mr. Lee: The court will, on behalf of Mrs. Maginnis, note an exception.

PLEADING—RES ADJUDICATA—RECEIVERS—BONDS.

[Lucas Common Pleas, February 9, 1891.]

HORACE S. WALBRIDGE V. UNION MANUFACTURING CO. ET AL.

STATEMENT OF FACTS.

An action was brought asking for the appointment of a receiver: To this a creditor of the corporation filed a cross-petition seeking to subject the assets of the corporation and the stockholders liability, to the payment of his debts. A demurrer to the cross-petition was sustained by Judge Pugsley on the ground that the creditors could not intervene for such purpose but must bring an independent action. A stockholder of the corporation then brought an action to foreclose a mortgage against this corporation. To this action other creditors intervened by cross-petition setting up first, the action asking for a receiver and the appointment of a receiver thereunder; Second, that bonds had been issued by the corporation and subscribed for by the plaintiff in the foreclosure suit at less than par; that the transaction was really a loan; that the subscribers had been paid interest on the bonds at their par value; and asking that this excess of interest be applied upon the claim of the mortgage. It appeared that this bond issue was made before the cross-petitioners claim accrued. To this cross-petition a demurrer was filed. Upon these facts Lemmon, J. held:

1. The ruling upon a given question of one member of the court of common pleas in a county, would be regarded, by the other members of the court as final, and followed by them, as between the same parties either in the same or another suit.
2. The first cause of action in the cross-petition to the foreclosure suit was within the ruling of Pugsley, J., on the cross-petition to the receivership suit, and, therefore, demurrable.
3. The second cause of action in the cross-petition to the foreclosure suit was in view of the relief asked, demurrable, the petitioners claim having arisen, after the bond issue, and there being no allegations of fraud, deceit, or that the issue was made in contemplation of a debt. The allegations in this second cause of action would, however, entitle the petitioners, as creditors, to call for a full settlement of the affairs of the corporation, including unpaid stock subscriptions, and stockholders liability.

LEMMON, J.

The question was presented to the court upon demurrer to the cross-petition of the Farrell Foundry and Machine Co. to the action of Horace S. Walbridge, trustee, against The Union Manufacturing Co. and Alvin Peter, receiver, to obtain foreclosure of a mortgage.

The demurrer is for the following reasons:

That the statements and allegations of fact in said answer and cross-petition contained and in each separate defense and cause for affirmative relief therein set forth are insufficient in law to constitute a defense or a ground for affirmative relief.

That the said answer and cross-petition does not state facts sufficient to entitle the said defendant and cross-petitioner to the relief demanded.

Upon the submission of the case and the argument which was had upon this demurrer, there was, practically, but one question presented to the court—all the argument tending to support the proposition made by one side and to defeat it upon the other—and that was the question presented in the second cause assigned for the relief set forth in the cross-petition. It was said, however, by counsel who argued in support of the demurrer, that the first cause of action set forth for affirmative relief by the cross-petition of the Farrell Foundry and Machine Co. was one from which the defendant was barred by reason of the judgment of a co-ordinate branch of this court—the court of common pleas—held by Judge Pugsley, and it was stated that the questions which Judge Pugsley then had under consideration, when they were decided, would dispose of all matters presented in this first cause of action of the cross-petition. After the argument, and while we were considering the matter, we learned that Judge Pugsley had rendered a decision. That decision was taken down by a stenographer, and Judge Pugsley kindly sent me a copy of his decision.

Now the matters which were objected to and which the party by his demurrer declares present no cause for relief, as stated in this cross-petition are the complete statement which the Farrell Foundry and Machine Co. by its counsel make here of the proceedings which had been had theretofore in the action No. 30384 and entitled Horace S. Walbridge (and some others) against the Union Manufacturing Company, for the appointment of a receiver, and in which a receiver was appointed. This cross-petition proceeds to state: first, that the Union Manufacturing Company became indebted, by reason of the purchase of the property—perhaps in the year 1889—between October and November, or December of that year, and the indebtedness amounts to some eight hundred and odd dollars; that the Union Manufacturing Co. was a corporation, etc., and then set out that the cross-petitioners were also a corporation—giving its name, the title, etc., and the amount of the indebtedness. It then proceeds to state that an action was begun by Walbridge and others, against the Union Manufacturing Co. and describes the action briefly as No. 30384. It sets out what that action was brought for and it sets out all the allegations of the petition in that action and it then alleges and sets forth the affidavits which accompanied this petition, and the substance of the findings and what the court was asked to do, and it proceeds to allege that the court did appoint a receiver; and then it sets out quite fully what was contained in the journal entries and it is the only information which the court has, of that. It proceeds to declare of this journal entry—that although in the journal entry the

receiver, Alvin Peter, was required to ascertain the amount of the indebtedness of the Union Manufacturing Co. No order has been, since the appointment of the receiver, made upon the receiver, requiring him to proceed to ascertain the indebtedness of the company. It then proceeds to allege some other matters in reference to the shape of the property and what the receiver is doing, and it is quite full in stating what the receiver is doing in the way of manufacturing, the old material, carrying on the business, etc., and after that it proceeds to set up the substance of the cross-petition of this party to that action.

We have gone through these petitions, and they present (perhaps properly and necessarily in order to raise these questions) the matters which were involved in the case No. 30384. We have considered them in that manner. But we have been presented with the decision of Judge Pugsley, which was a matter in the contemplation of the parties at the time of the argument of the demurrer to me, in which Judge Pugsley takes up the questions which were raised upon the cross-petitions in the case of William Peter and others against The Union Mfg. Co. In these cross-petitions the petitioner sets up all these matters and he asks in the first instance that the parties be not permitted but be barred from proceeding here, because it is claimed that the whole matter is pending in case No. 30384.

The first cause of action of the cross-petition ends as follows:

"Wherefore this cross-petitioner, in behalf of itself and all other creditors of said corporation, presents the foregoing grounds of objection and hereby calls upon each of said defendants to co-operate with this cross-petitioner in procuring from this court the relief for which this cross-petitioner prays." It does not specify here what the relief is which is expected, but that is the prayer, so far as the first cause of action is concerned.

After setting forth the second cause of action (which we need not now undertake to state) there is a prayer, as follows: (And this, perhaps is intended to apply to both causes of action which are sought to be set up):

"Wherefore this cross-petitioner, in behalf of itself and all other creditors, prays that this court order plaintiff's petition filed in this action dismissed at plaintiff's costs, without prejudice to plaintiff's right in said action 30384, or by proper proceedings supplementary to said action." (That is, they ask that this action of Walbridge to foreclose his mortgage, be dismissed, without prejudice to plaintiff's right to take proper proceedings for the collection of said mortgage indebtedness in said action No. 30384—the action to appoint a receiver.) "Should this court refuse such relief, then this cross-petitioner in behalf of itself and all other said creditors, prays that this court order this action consolidated with said action No. 30384; that this court ascertain the true amount of money by said defendant corporation received in exchange for said bonds and the true amount of interest by said corporation paid thereon, etc."—proceeding particulars to the second cause of action set forth by the cross-petition.

Now it is manifest that where in an action pending between parties in this court, either of the judges holding court in the court of common pleas, county of Lucas, pass upon a matter, it is a necessity that when the same questions are presented between the same parties, either in the same action or in another action between them that the other judges of the court shall defer to and govern themselves by or treat as decided and

determined finally, so far as this court is concerned, all matters which have been passed upon by the other judges of the court, and, without undertaking to intimate any opinion whatever, we propose to lay down the exact rule and line which has been decided by Judge Pugsley in this case.

Now, Judge Pugsley passed upon several matters here in disposing of the demurrer which was decided by him. He said: "The first objection is as to the answer and cross-petition of Gilbert." (Gilbert was another cross-petitioner who came in, by his counsel, Mr. Tolerton, filing a cross-petition similar to that filed by Messrs. Bissell & Gorrill for the Farrell Foundry and Machine Co.) "That it does not sufficiently appear that the cross-petitioner, Gilbert, is a creditor of the Union Manufacturing Co. It does state that he is a creditor; that he is a creditor and that he is the owner and holder of two promissory notes, etc." And the court holds that the objection is not well taken.

Judge Pugsley continues: "2d. The next objection is: That there is a misjoinder of several causes of action. The claim is that there is one cause of action set out in this cross-petition for a judgment against the company and another cause of action for a judgment against some of the stockholders, and not all, on their unpaid stock subscriptions." And then a judgment is asked against all of the stockholders upon their statutory liability. The court proceeds to argue this question and to show that there is but one cause of action—which is the indebtedness of the Union Manufacturing Co., and that these are only remedies which were sought in order to secure payment, and then proceeds: "The next objection is: that the attempt to collect the unpaid subscriptions and to enforce the stockholder's statutory liability is prematurely made. The claim is that an action cannot be brought by the creditors, to subject the unpaid stock subscriptions until the assets of the corporation are exhausted, or so far exhausted that it is shown that there will be a deficiency, etc."

He examines this question and cites two decisions of the Supreme Court in which the question is passed upon, holding that the position is not well taken—that from the time of the insolvency of a corporation an action may be brought for the purpose of securing a complete settlement and enforcement of the stockholder's liability.

Now he comes to the fourth proposition: "The next objection is: That unpaid stock subscriptions are assets of the corporation, and the receiver is the only one who can bring the action to enforce their payment. The only remedy it is said that the creditor has, so long as the authority of the receiver exists, is to apply to the court appointing the receiver for an order directing him to commence proceedings to enforce the payment of such unpaid subscriptions. I look upon that objection as somewhat technical," etc.

He proceeds to pass upon that question and then takes up the fifth one, and it is to that I wish to call particular attention. He considers the question as to whether the parties have a right to come in here as cross-petitioners at all. I was at first somewhat at a loss in reading this decision to understand what rule it laid down for the future guidance of the court, because of these several decisions which are made upon these propositions, and the last decision which he makes, declaring that the parties are not either entitled to file cross-petitions or to have any relief whatever. I now see that he intended no more than to indicate an opinion upon these questions, because they might come up again, and

probably would come up again, on the further hearing of the case; but they were not necessary to be considered in the case, because the parties were not properly here as cross-petitioners. And that he presents in the following manner. He says:

It is objected here, however, first: That these cross-petitioners are not proper cross-petitioners in this case. In other words, that these creditors have no right to come into this action and maintain their claim to subject the assets of the corporation and the liability of the stockholders to the payment of their debts. The action is brought solely for the purpose of the appointment of a receiver. If the court had refused the appointment, that, I take it, would have been the end of the case. All the orders that are asked for in the case could be made in the event only that a receiver was appointed. Now, for the purpose of this hearing, it must be assumed, I think, that this petition was rightly brought; that it states a case for the appointment of a receiver, and that a receiver was rightly appointed. If it be a fact that the petition did not state a case for the appointment of a receiver, or that the court was without jurisdiction in the appointment of a receiver, that question can be presented in a proper way, by an application to the court on behalf of the creditors for a vacation of that appointment. And for the purpose of this hearing, as I have said, it must be assumed that the receiver was rightfully appointed. And if it were true that the court was without jurisdiction for the appointment of a receiver, that would be a good reason, in my judgment, why the creditors would have no right to come in this action and assert those claims which they do. This action was brought, as I have said, solely for the purpose of the appointment of a receiver—was brought against the corporation alone, and these parties were not parties to the action, and of course no relief was asked against them, and they were not necessary parties to the settlement of any questions involved in the action. As creditors, they are proper parties, because they are increased as creditors in the appointment of the receiver and in the manner in which the receiver shall perform his duties. They have the right as such creditors to ask the court for any proper order pertaining to the receivership—to the manner in which the receiver shall perform his duties, even to the extent of asking the court to vacate the appointment of the receiver, but having been made parties to this action for a proper purpose—they now seek to inject into it an entirely new case, and a case which has no connection with the subject of the case which, as I have said, is the appointment of a receiver and the making of the proper orders touching the receivership, and a new case, which renders it necessary to bring into this action a large number of new parties, making entirely new issues foreign to the character and objects of the original suit. "The matters in question in the petition" and the "subject of the action"—using the language of the code—are only the appointment of a receiver and the regulation of his conduct as receiver—questions with which the claims of these defendants have no connection. Now it might be said also that this objection is of a technical character; but it seems to me that it is a case where the rules of practice may be strictly followed, because, in my judgment, it is wholly unnecessary to come into this action. I see no reason why these claims of these defendants which they seek to assert in this action cannot be the subject of an independent action. And the demurrer is sustained.

Now, without indicating any opinion which this branch of the court would have upon that question upon which the matter was determined

on that demurrer, we are bound to and we cheerfully follow the decision of Judge Pugsley and hold in this case that that rule must be applied to a demurrer which is filed between the same parties, concerning the same subjects of action, in this action before this branch of the court. And it involves this, then: He holds that in the action No. 30384 the matters set up in the cross-petition of the Farrell Foundry and Machine Co., was improperly set up—could not be properly reached there, and that being the case, the setting up of the action No. 30384—the pleadings in the case and the action of the court in that case, does not set up a bar to the present action. He holds that there should in that case be an independent action, and it is to this independent action that the action No. 30384 is set up as a bar.

We must be guided by the decision already made in the case until a court having authority in a proceeding for the purpose, reverses the judgment which has been pronounced by the other branch of this court. We must therefore sustain the demurrer to the first cause of action set up in this cross-petition.

Now as to the second count set up in this cross-petition. It alleges that in 1883 (and while I state this it must be borne in mind that the indebtedness of the Union Manufacturing Co., to the cross-petitioner, The Farrell Foundry and Machine Co., was created in 1889). It sets up that in 1883 the Union Manufacturing Co., made a conveyance to Walbridge, as trustee, for the purpose of securing one hundred thousand dollars of bonds which were to be issued; and they set up that these bonds were sold to different persons and were principally taken by Walbridge, by William Peter and by others, stockholders and directors of the Union Manufacturing Co., a corporation; that these bonds were taken at seventy-five cents on the dollar, and then more particularly sets out each of the bonds as they were sold and disposed of and the prices which were paid for them; and it alleges that interest has been paid on these bonds, at a rate named, from that time down to October, 1890, perhaps. It alleges that there is not so much due to them as is claimed, that interest has been paid upon the face value of the bonds, although they paid for these bonds but seventy-five cents on the dollar. It alleges that this sale of bonds to the directors and stockholders of the Union Manufacturing Co., was but a loan, of the money, from the persons who took these bonds, to the Union Manufacturing Co., and that the interest which they have received should be applied upon the amount of money actually advanced to the Union Manufacturing Co., and used by the Union Manufacturing Co., in its business, and that when this is done a much less sum will be due, and it asks for an accounting, etc.

A demurrer is filed to this. And, upon the hearing of the demurrer it was argued that these creditors, not being creditors at the time of this transaction which they are going back to, have no right to be heard upon the matter. It is said that without allegations of fraud, or deceit, or overreaching, they cannot be heard here to impeach the transactions that took place between parties definitely described by the cross-petition, and the Union Manufacturing Co., six or seven years before (they the cross-petitioners) were creditors, and without any allegation that this was done in contemplation of creating a debt—the debt which is owed to the Farrell Foundry and Machine Co. Many authorities are cited to support the proposition made by the party demurring to this cause of action. We have examined them, and we think the position is well taken, and that without additional allegations here in this petition no cause is assigned

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which will enable the Farrell Foundry and Machine Co., to come in and inquire into that transaction which took place between these parties and which is set out, because at the time of these transactions they received only seventy-five cents on the dollar for these bonds, and the demurrer in that respect therefore must be sustained.

Now, while we sustain the demurrer to the first cause of action—that is to the relief asked there, it is rather a sustaining of the objection that is taken to the relief asked than a sustaining of the demurrer as a whole to the facts that are set out; for we shall follow Judge Pugsley's decision here in which he indicates that while they could not make these defenses in that action—No. 30384—they are entitled to make these defenses, as creditors. There is no doubt but that they are creditors of the Union Manufacturing Co., upon the statements of the petition, and they are therefore interested in the matter of unpaid stock subscriptions. It is alleged that the Union Manufacturing Co. is insolvent, and, under the decisions of our Supreme Court, they have a right to call for a full settlement of the affairs of the Union Manufacturing Co., including the unpaid stock subscriptions and the statutory liability of the stockholders. We think, to that extent, if there were a prayer for it, we should have to overrule the demurrer as to the second cause of action; but there is no prayer for any such relief, and we must therefore sustain the demurrer as to the entire cross-petition, unless there is in that respect an amendment.

Mr. Bissell: Is your honor sure that there is no such a prayer for relief in the petition?

The Court: Not that I remember. There is nothing here. The case which you began we haven't examined and know nothing about except an incidental reference which is now made by counsel. I pass upon nothing that there is there.

Mr. Bissell: The same prayer is in the cross-petition in No. 30384.

The Court: We in that case simply follow the rule laid down by the other branch of this court.

Mr. McDonnell: We ask that a decree be entered in this case of Walbridge against the Union Manufacturing Co.

Mr. Bissell: I will ask for leave to amend forthwith and present a prayer for the winding up of the affairs of the corporation in the city of Toledo.

Mr. McDonnell: We ask that a default be entered.

The Court: We will sustain the demurrer and give the parties leave; we think there has been enough difficulty in reaching the matter here to say that the parties are not in special default, that they have not tried these cases; we think they should be permitted to amend.

Mr. Bissell: Your honor will enter an exception also to the sustaining of the demurrer.

Mr. McDonnell: Within what time should this amended cross-petition be filed?

Mr. Bissell: Oh, a fortnight.

The Court: We will give you that time.

Mr. Kinney: I will make a suggestion: It is the desire of every one that this property should be sold at as early a day as possible. In a decision which I called your honor's attention to, just exactly such an order was granted. The court held that the creditor had the right to raise the question there, nevertheless it entered judgment against the principal defendant for the full amount of the claim and ordered the

money brought into court to await the final determination of the court as a question of distribution. Now I suggest—whether this amendment is granted or not—that all the rights can be preserved here by such an order as that. That presents the principal and a sale can be made and the money brought into court and leaves the court to say how the money shall be distributed.

Mr. Bissell: There is no right to sell except for unpaid installments of interest. There are only two or three unpaid installments due, and if we are correct in our theory of the case, there is no right to sell for any purpose, and I would like to have that question settled before a sale is made.

Mr. Kinney: It will bring more if it is sold as a "going" institution.

Mr. Bissell: That is what we are trying to have done. We don't wish to have an order entered that we are not entitled to any possible—

The Court: (To Mr. Kinney.) You ask to have an order of sale issued, and your objection—Mr. Bissell—is what?

Mr. Bissell: My objection to that is that they have not shown authority for an order as yet. If we are correct, and if an amendment of our petition will anticipate and so convince this court that we are correct, there is no interest due them. They are not entitled to an order of sale any way.

Mr. McDonnell: That simply applies to the distribution of the proceeds.

Mr. Bissell: It applies to the question as to whether the mortgage is forfeited.

There is nothing due on the mortgage.

The Court: That question, we have passed upon this morning.

Mr. Bissell: But, if the petition were amended, I understood the court to say that the demurrer wouldn't be overruled.

The Court: Not as to the second cause of action set forth in the cross-petition; as to that, we hold that you are not permitted to come in here and object to that proceeding. On that matter of putting out those bonds and the placing of them at seventy-five cents on the dollar, that is a matter into which you cannot inquire, without additional allegations in your cross-petition—allegations of fraud, which would enable you to object.

Mr. Bissell: I object to any entry being made at present, until I can look over your Honor's decision. I object to any entry being made at present of any default or order of sale.

The Court: You may call it up again next Monday morning.

ARREST ON AFEIDAVIT—ORDINANCE—POLICE JUDGE— DISORDERLY HOUSE.

[Lucas Common Pleas.]

WILLIAM BROWN V. CITY OF TOLEDO.

1. Where arrest is made upon affidavit which contains sufficient allegations to constitute a charge under one section of an ordinance and some words found in another section, describing another and different offense, proceedings will not be quashed on ground that separate and distinct offenses are charged, but all words not necessary to describe an offense under the first section, stricken out as surplusage.
2. An ordinance is not invalid because the penalty is prescribed in a separate section of the same ordinance, from that describing the offense.

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3. That portion of section 1882, Rev. Stat., which provides that a fine of \$50 shall not be deemed unreasonable, but where in any by-law a greater fine or penalty is imposed, it shall be lawful for the court or magistrate to reduce the same to such amount as may be deemed reasonable and proper, does not make an ordinance illegal which allows a fine of \$100, and a fine of \$50 under such ordinance cannot be declared unreasonable.
4. Where defendant is charged with keeping a disorderly house or "a house where drunkards, tipplers, gamesters, vagrants, prostitutes or other idle or disorderly persons resort or congregate," no *scienter* need be alleged, as the specific charge of the offense contains within its terms the knowledge of the purpose.
5. When offense is laid in the *continuendo* no specific time need be alleged in the affidavit.
6. It is not necessary that a house occasion annoyance to neighbors or residents of the vicinity, or be a nuisance, in order to be unlawful, and no allegations of annoyance or disturbance are necessary in affidavit or indictment for keeping such house.
7. Names of those frequenting such house need not be given in such indictment or information, as character of house may be proven by general reputation.
8. An acting police judge, appointed by the mayor according to the provisions of sec. 1802, Rev. Stat., to act during the absence or disability of the police judge, is at least, a *de facto* judge.
9. If defendant makes no objection to the jurisdiction of the acting police judge until after his decision in the case, he has waived that objection and cannot raise the question afterward.
10. Whether the law vesting in the mayor power to appoint such acting police judge is constitutional: *quære*.

HARMON, J.

This is an error case, coming up here from the police court. A prosecution was commenced in the police court, by the filing of an affidavit August 4, 1887. The affidavit was made out by James Duffy. The affidavit sets forth that on or about January 1, 1887, at said city and county, and continuously from said first day of January up to and including August 3, 1887, (that is, the day before this affidavit was filed), one William Brown unlawfully kept a disorderly house, a resort of drunkards, tipplers, gamesters, prostitutes, vagrants and other disorderly persons, and unlawfully allowed to be committed in and about said house noise, clamor, disturbance of the public peace and assault and battery. The ordinance on which this prosecution was based is sec. 415, which provides:

"It shall be unlawful for any person or persons to keep a disorderly house or place, or house or place where drunkards, tipplers, gamesters, vagrants, prostitutes, or other idle or disorderly persons resort or congregate."

And the following section (416):

"It shall be unlawful for any person to use or suffer to be used, in or about any house, building, or premises, by him or her kept or occupied, any lewd, obscene, profane or indecent language, to the disturbance or annoyance of any person or persons, or to commit, or to suffer to be committed, in or about any house, building or premises, by him or her kept or occupied, any riot, assault and battery, disturbance, noise or clamor."

Now this affidavit is filed and the defendant arrested and brought up, and it appears on the record, that, before pleading to this charge, a motion was filed in which an attack was made upon this affidavit.

In the first place, it is charged, in this motion: That two separate and distinct offenses, under different sections of the ordinance, are

improperly joined and united in one count, and it is claimed, and the motion asks, that it should be quashed.

Now we observe that the first section referred to—415—forbids the keeping of a certain kind of a house. Section 416 forbids the commission of certain acts in or about the house or premises. It is observed also that this whole charge is laid with a *constituendo*, and it is claimed that the commission of specific acts cannot be so laid. Now, this affidavit contains the charge of keeping a disorderly house. That part of the affidavit which it is claimed charges the offense under sec. 416, is quite limited and rather meager. "And unlawfully allowed to be committed in and about said house noise, outcry, clamor and disturbance of the public peace and assault and battery." It contains some of the words contained in sec. 416, but I do not think it contains sufficient to constitute the charge, under that section; and, under the authority of *Holtz v. State*, 30 O. S., 486, I think this may be treated as surplusage. That is a case where a party was indicted for receiving and concealing stolen goods, knowing them to be stolen. There was a statute making it an offense to conceal stolen goods—not alleging any knowledge—and the other part of the indictment charged that the party received and concealed stolen goods. The court treated the concealing as surplusage, and held that the indictment was good as a charge of receiving stolen goods knowing them to be stolen. The case was reversed, on other grounds, but the court so held in that case; and we think this affidavit is not bad in that respect.

It is also claimed that this ordinance will not support any charge of an offense, because secs. 415 and 416 describe the offense, define the offense, and under sec. 417 the punishment is prescribed—the statute providing that each ordinance—special ordinance—may provide punishment for its infringement or a general ordinance may pass providing for the punishment of its violation. I do not think that constitutes any objection; I think the penalty may be put in a separate section of the same ordinance.

Third, it is claimed that where an ordinance imposes a greater fine than fifty dollars, under the statute, sec. 1862: "It shall be lawful for the court to reduce the same to such amount as is reasonable." An ordinance was passed doubling the amount named in this statute—to \$100—doubling the amount of the sum permitted by the statute. The statute fixes fifty dollars as not an unreasonable sum, but the ordinance provided that a fine might be imposed to the amount of \$100, and it is claimed that the ordinance is void. We think that this statute points specially to a case of that kind—where the council go beyond the amount that the legislature thought might be reasonable for such offense as the council was authorized to place a penalty upon. The legislature state fifty dollars, but they provide that if the council should go beyond that sum then it shall be lawful for the court to reduce the same to such amount as is reasonable. Now the court imposes a fine of fifty dollars. I think that is proper. The ordinance is controlled by the statute giving the court discretion if the court go beyond that, to impose such punishment as is reasonable. The legislature permitted the council to impose a fine of fifty dollars: that indicates the opinion of the legislature as to what might be reasonable; and I am not able to see that this penalty was unreasonable, because the statute says, "it shall be lawful" for the court to do just this thing.

It is also claimed that no *scienter* is alleged. It is provided in the ordinance that it shall be unlawful for any person to keep a disorderly house, or a house where drunkards, tipplers, gamesters, vagrants, prostitutes or other idle or disorderly persons resort or congregate. In the statute which I have already spoken of as to concealing stolen property, which was involved in the case of 30 O. S., where the statute made it an offense to receive stolen goods knowing them to be stolen, and of concealing stolen goods, the court well remarked that it was unnecessary to alleged *scienter*—because the charge of concealing was a sufficient charge of knowledge, and I think that the nature of this offense is such that when a charge is made specifically of this offense, it contains within its terms the knowledge of the purpose—that a party could not keep such a house or resort without knowledge. It was kept knowingly—the same as the court remarked, if a party concealed stolen goods, and that was charged, it was a sufficient allegation of *scienter*.

Now as to the time. Of course no time is alleged, as the motion suggests; but that charge, under sec. 416, is rejected as surplussage, and it is laid in the *continuendo*, as is proper for such offenses, the keeping of that house.

Another objection in this motion was: That there was no allegation that the disorder or noise occasioned annoyance or discomfort to the people of the city generally. All the allegations of this noise and outcry and clamor and assault and battery, and things of that kind, is rejected. We regard that as surplusage. I think it was urged in argument that even the keeping of a disorderly house must occasion an annoyance, or be a nuisance, and it must be so alleged. It will be seen that these offenses are of a different nature: one, is barely the keeping of a house of a certain character; the other, the permitting of certain acts to be performed. Now then, it is held, in numerous cases, and it is decided in one of Eads' reports—an old English case—that the keeping of a brothel is the keeping of a disorderly house; that the keeping of a house of prostitution is a disorderly house; a bawdy house is a disorderly house, and it is held, in numerous cases, that under the charge of keeping a brothel, a house of prostitution or a bawdy house no evidence will be received that it was kept quietly and without any annoyance or disturbance of the neighbors. That has been held in numerous cases. But these cases that were cited on that point from Pennsylvania and Indiana, I think, were cases under a statute charging the commission and permission to commit, certain acts. But this is the charge of the keeping of a certain kind of a house, the keeping of a resort for certain classes of people—criminal classes. Now then, there is a policy of the law which would be subverted by the not permitting people of this class to assemble and congregate together. If they have some place where they may congregate and assemble, people of that class—and are permitted to come together in that way, they may perfect and concoct their plans for the breaking of the law; their influence one upon another is such as to continue them of that character. It permits them to assemble there and encourage one another, and I am not so positive, as is suggested in this case—I am inclined to think that it would be criminal, or that it might be made an offense properly, for any persons to keep such a house, although it were in the midst of a forest—in the solitude—a house for such people to assemble in. It would not disturb anybody at all—except as it would have a tendency to produce crime and foster crime and encourage the criminal classes. Now, that was the view that was

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taken of a similar statute, by the Supreme Court of Wisconsin, in a case which was quite ably considered. This was a charge of keeping a disorderly house and a place for criminals to assemble. The defendant requested a charge—that the disorderly conduct must be sufficient to disturb the peace and quiet of the neighborhood—not merely that there was immoral, illegal or lascivious conduct in the house—and it was held that such houses are prohibited as much on account of their tendency to promote immorality, as on account of the noise made by the inmates, and that the request was properly refused. That was held in *Thatcher v. State*, 48 Wisconsin, 60, and, upon that ground under such a policy—it would be proper, and I think this ordinance may be sustained. Of course, if this affidavit is held to be bad, I am inclined to think that the ordinance would not be sufficient, on the charge of keeping a disorderly house. If it is necessary to set forth in the affidavit that the neighborhood was disturbed, the ordinance must prohibit disturbance; and the ordinance does not prohibit disturbance—it merely prohibits the keeping of such a house.

Now it is claimed that the names of the persons frequenting this house should have been given, in order that the party might have an opportunity to show that those persons were not of the character charged. It is held, in numerous cases, that evidence may be received of the reputation of such a house. Witnesses may be called and testify to the reputation of the house, without saying anything about the character of these people—in order to establish the offense of keeping a disorderly house. You may call witnesses to testify to the reputation of the house. But this question was directly before the court in *State v. Patterson*, 7 Iredell (N. C.), 70, and re-reported in 45 Am. Rep., 506, in which it was held that an indictment need not give the names of the persons frequenting a disorderly house. Also in *State v. Dane*, 60 N. H., 479,—re-reported in 49 Am. Rep., 331. Also in *State v. Doyle*, 15 Pa., 527. Those cases held that point, and I think it is sufficient.

For cases holding that the reputation of a house may be given in evidence, there are *Commonwealth v. Gannett*, 1 Allom, 7 (Mass.); 79 Am. Dec., 693; ——— *v. Chartrand*, 1 Dacotah, 379; *People v. Hulett*, 15 N. Y. Sup. St., 630; 79 Mich., 110; 89 Iowa, 75; and there are many others on that point. In *Brown v. State*, 49 N. J. Law Rep., 61, it is held that permitting habitual violation of law in the house constitutes the offense, and that case goes to the extent of the English cases, in holding that a house of prostitution or a bawdy house is a disorderly house.

The police court of the city of Toledo was held at that time by what is called an "acting judge"—that is, a person appointed by the mayor, to hold court in the absence of the regular police judge. It is contended with a good deal of earnestness, and with a good deal of force, we think that that person could not hold a police court. It is claimed that this person, appointed by the mayor to be acting judge and to hold court in the absence of the police judge could absolutely hold no court at all, not even coming up to the station of a judge *de facto*. The objection made on these points was not made in the motion, but it was made afterwards, when the motion for arrest of judgment was made after the case had been heard, and a decision against the defendant below—probably before judgment. There was some objection made on behalf of the defendant in error here, that the judgment was actually entered when the case was decided; but I think that is sufficiently decided—that there is an

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interval there, between the decision and the judgment—or should be—and if the judgment was actually entered before the motion was filed, still the party has a right to have that motion submitted and passed upon. This appointment is made by the mayor, in accordance with a statute passed by the legislature to that effect, and it is claimed that the statute provides how a judicial officer shall be chosen. The deputy should be elected in their district, by the electors of the district, and in cases where a vacancy occurs, an appointment may be made by the governor until the next election. I think that section arises under article 4 of the constitution and the appointment provided for in section 13. Now there was no vacancy in the office—merely an absence, for the statute provides that the appointment shall be made in the absence of police judges. There was no vacancy. It was objected that the mayor cannot create a judge. That question was before the Supreme Court of Wisconsin—precisely the same question—and the constitution of that state is similar to ours upon that question—upon this matter of providing for the choice of judges. The constitution, in that case, is cited, the different sections—and they appear to be, in substance, the same as our own. That case was very fully considered and a great number of authorities examined. That was a case of the appointment of a police judge, to hold court, not where a vacancy occurred, but in the absence of a lawful judge. This was the case of *Slyke v. Insurance Company*, *supra*. The statute—and this was a case of a police court—provided there, that where a judge was interested or prejudiced, that any reputable member of the bar might hold the court, that the parties should agree upon. In this case a member of the bar was chosen to take the place of the judge—who was interested in the case, and the parties consented to his trying the case and proceeded to trial. But the party against whom the decision was made was dissatisfied and brought the case to the Supreme Court. *Slyke v. Ins. Co.*, 39 Wis., 390; also 20 Am. Reports, 50. It was held that the statute authorizing these actions in which the judge was interested, or prejudiced, to be tried by consent of the parties before counsel of the court, was unconstitutional, and that the person who assumed to act under it was not even a judge *de facto* and that his judgment was absolutely void. Now, upon the reasoning of that court and the authorities there cited—this court—if the case had been untouched in Ohio, could feel compelled to follow that decision. Of course I am aware that the decision here held that this appointment could not be made, or that the person was not an acting judge as spoken of in the statute and actually had no power whatever to hold court and that all his judicial acts are null. Such a holding here, might seriously embarrass the police department and the city government, in case a judge should be sick for a few days. It would hold him every day, almost, except Sundays, nailed to the bench—as you might say. But this case has been examined in Ohio. It came before the Cuyahoga court of common pleas in *Moliter v. State*, 10 Ohio Dec. Re., 324. This was a prosecution under the Dow Law.

The first error claimed was: That the police court had no jurisdiction over the plaintiff in error, for the reason that the person occupying the bench of that court and acting as police judge, was not the duly elected judge, nor a justice of the peace, mayor, or other person duly elected to exercise judicial power and functions. That sec. 1802, Rev. Stat., which authorizes the mayor to select a person to act and perform the functions of a police judge in the temporary absence of the regu-

larly elected police judge, is unconstitutional and void, inasmuch as it delegates to the mayor a power which belongs to the people, to-wit, the power of electing their own judges; and that the only power of appointment that can be exercised in a judicial office is that of the governor for a judicial vacancy.

There was no vacancy here. The court in examining that case, holds, on the authority of *Ex parte Strang*, 21 O. S., 610—really. He says this case throws very little light upon the question; but, upon the authority of that case, the court held that the police judge did not err in overruling defendant's objection to the jurisdiction of the court. It seems that an objection was there taken at the outset, to the jurisdiction of the court.

Now, in *Ex parte Strang*, 21 O. S., 610, it is held that:

1. "The acts of an officer *de facto*, when questioned collaterally, are as binding as those of an officer *de jure*."

This matter was questioned collaterally.

2. "To constitute an officer *de facto* of a legally existing office, it is not necessary that he should derive his appointment from one competent to invest him with a good title to the office.

That is directly contrary to the holding of the Supreme Court in the *Wisconsin* case.

"It is sufficient if he derives his appointment from one having colorable authority to appoint; and an act of the general assembly though not warranted by the constitution, will give such authority."

That is, it will give colorable authority to the mayor to appoint an acting police court.

3. "By sec. 174 of the municipal code, the mayor, in the absence or disability of the police judge, is authorized to select a member of the bar to hold the police court, who, it is declared, shall have, for the time being, the jurisdiction and powers conferred upon judges of police courts and shall be styled 'acting police judges.' Held: That assuming (but without deciding the question) the power of appointment thus conferred on the mayor to be unauthorized by the constitution, yet the person acting under such appointment would be a judge *de facto*."

Now, with that authority of the Supreme Court, directly binding upon this court, I am of the opinion that the acting judge there appointed by the mayor was a judge *de facto*. This being a misdemeanor—no objection being taken to his jurisdiction until after his decision in the case—that the party waived that objection by pleading and going to trial, and that he cannot now complain.

I think this is a disposition, substantially, of the questions by the petition in error, and the petition is therefore dismissed. We find no error manifest upon the record.

Mr. Ritchie: We think that the questions involved are of sufficient importance, at least some of them, to justify an examination by the circuit court. The Court: I think that question ought to be decided. This case in 21 O. S., perhaps is different in that it came up collaterally; but it goes so far that I think it constrains this court to follow it.

Mr. Ritchie: I will note an exception.

EMINENT DOMAIN—JURY.

[Clark Probate Court.]

OHIO SOUTHERN R. R. CO. v. AUGUST R. KLOBB.

1. In a common law action, the impaneling of the jury is a part of the trial of a cause, but condemnation proceedings are special proceedings, and not common law actions, and are entirely governed by the statute creating them.
2. In an action by a railroad company to condemn and appropriate to its use, five separate parcels of land belonging to as many different persons: Held, that all the defendants are jointly entitled to but two peremptory challenges, and no more.
3. The right of peremptory challenge in condemnation proceedings is one of privilege, and not one of right; this is to be conclusively presumed from the fact that the act of April 30, 1852 (50 O. L., 201), had no provision whatever for its exercise.

ROCKEL, J.

The Ohio Southern Railroad Company filed its petition in the probate court to condemn and appropriate to its use, five separate parcels of land belonging to as many different persons.

In impaneling the jury, after all challenges for cause had been made, each of the five land owners claimed the right to have separately, and not jointly two peremptory challenges.

It is insisted by each of the defendants herein that he has the right to two peremptory challenges. Some of them argue that this follows from the fact that the statute gives each a right to a separate trial, and that impaneling a jury is a part of the trial of a cause. Others ingenuously argue that sec. 6426, Rev. Stat., uses the words "the owners of the property which is the subject of the trial, etc.," means that it is only where there are several owners of an undivided tract of land that there is to be a right to only two peremptory challenges. And that, if the legislature would have intended to limit the right to two peremptory challenges, jointly, to all the defendants in a case like the present one, the word property, in that part of sec. 6426 above quoted, would have been pluralized, and it would read "the owners of the properties," etc.

In reference to the first of these claims it may be sufficient to say, that in a common law action, the impaneling of the jury is a part of the trial of a cause, but condemnation proceedings are special proceedings, and not common law actions, and are entirely governed by the statute creating them.

No doubt, there is some confusion as to the meaning of the law in its reference to separate trials, for separate landowners, etc. But it is believed to mean, and such I believe, is the general practice, that one jury is to try all the cases.

The jury is to be first impaneled, each case is to be tried separately, that is, evidence is to be heard, arguments of counsel made, the jury charged by the court, and a verdict rendered on the one case then under consideration, and in like manner each case is to be proceeded with until all are heard. See *Giesy v. R. R.*, 4 O. S., 308, 322.

If the claim that sec. 6426, Rev. Stat., when it provides: that "When the jury box is filled with twelve disinterested jurors, the owners of the property which is the subject of the trial, jointly, and the petitioner shall each have the right to two peremptory challenges, and to challenge for cause," by the use of the word "property" instead of "properties," that the right to two peremptory challenges on the part of

the land owners should only be exercised jointly, when they were all tenants in common in the same tract of land sought to be appropriated, there could only be an inference that in a case like the present any peremptory challenge at all would exist for the defendants.

As before remarked, this is no common law action, and there is no such a thing as a common law or a constitutional right to any peremptory challenge.

If the statute does not provide for peremptory challenges, there are none. But it is said, suppose in this case where there are five defendants, they can't agree whom they shall challenge, would they lose their peremptory challenge? Well, I suppose they would. This might seem a hardship, and somewhat of an injustice, perhaps, but this may arise in actions at law.

Thompson on Trials, says sec. 46: "Where several persons are joined as plaintiffs or defendants in a civil action, the general rule, arising upon the express terms and reasonable interpretation of statute, is, that the number of peremptory challenges is restricted to each aggregate party considered as a unit." That is to say, all the parties, plaintiff or defendant, must join in their challenge.

This rule has been applied to civil actions under the statute of Ohio, *Gram v. Sampson*, 2 Ohio Circ. Dec., 666; *Moore v. Brickmakers' Union*, 10 Ohio Dec. Re., 665.

That the right of peremptory challenge in condemnation proceedings is one of privilege, and not one of right, is to be conclusively presumed from the fact that the act of April 30, 1852, 50 O. L., 201, had no provision whatever for its exercise. In commenting on this law, Judge Ranney says, "But how shall the jury be impaneled? In each case separately, or for all the cases embraced in the statement jointly? Upon this subject, the statute, like too much of our legislation, is full of doubt and obscurity. It expressly gives the right of challenge for cause to either party. The right of the owner to retain upon the panel, such members of the regular jury, as neither the company nor himself could except to, would seem to be almost equally important; but it is seriously impaired if he is bound to submit to challenge made by the owners. I am, however, inclined to think that the law subjects him to this inconvenience, and contemplates but a single jury, to be composed of those against whom no just exceptions can be alleged by any of the parties interested." *Giesy v. R. R.*, 4 O. S., 322.

The act of 1852 was amended by the act of April 23, 1872, 69 O. L., 88, in sec. 5 of which it was provided: "Each party shall be entitled to the same peremptory challenges, and challenge for cause, provided by law in other cases."

But to meet just such questions as arise in this case, this law was changed by the codifiers of 1880 into the present law. If the act of 1872 were still in force, it might be a serious question but what each defendant would be a party within the meaning of the act and entitled to his peremptory challenges. But even if this were still the law, and the rule adopted in *Gram v. Sampson*, *supra*, and *Moore v. Brickmakers' Union*, *supra*, was applied, all the defendants herein would constitute but one party, and be entitled to but two peremptory challenges, jointly, and such has been the ruling in an appropriation proceeding by a municipal corporation. See *Cincinnati v. Neff*, 10 Ohio Dec. Re., 279.

But to my mind, there is but one meaning and interpretation to be given to the present law, and that is, that all the defendants are jointly entitled to but two peremptory challenges, and no more.

CONTRACTS—INJUNCTION.

[Muskingum Common Pleas.]

PARAGON OIL CO. V. W. K. FAMILTON.

A contract whereby an employee is prevented from entering the service of his employer's rival within one year, irrespective of the cause for which he leaves his employer, or is discharged, is oppressive and unjust; and, therefore, an injunction should not be allowed to enforce such contract.

MUNSON, J.

The petition alleges, that defendant contracted in writing with plaintiff, October 1, 1896, that in consideration of being employed by plaintiff, and payment of \$1.00 per day, or other consideration, he would not for a year after leaving plaintiff's service for any cause, do anything within the city of Zanesville, in the line of selling and delivering oil or gasoline at the houses of consumers, by horse and wagon, or otherwise—neither in his own name, nor in connection with any partnership or corporation, nor as the agent of any other person, partnership or corporation, nor in any wise, that would interfere with, compete with or work against the profit or advantage, or business of plaintiff. * * *. And would not accept employment directly, or indirectly, solicit or receive, or fill orders in any capacity whatever, for any oil or gasoline to be sold direct to, or delivered at the houses of consumers by wagon or other conveyance, for the year after leaving plaintiff's employment for any cause. And would not aid, countenance, promote nor encourage, the business of any competitor of plaintiff, its successors or assigns, within the city of Zanesville, for a year after leaving plaintiff's employment for any cause.

That plaintiff did employ defendant under that contract, and he began to work for plaintiff, selling oil and gasoline until September 25, 1897, when he left plaintiff, and began, and still continues to sell gasoline in Zanesville, to consumers, in violation of his contract.

Defendant's employment by plaintiff, it is alleged, gives him knowledge of the business affairs and methods of plaintiff, and an acquaintance with, and knowledge of the customers of plaintiff, which he can now use so as to benefit a rival of plaintiff, and seriously injure it, and is now so using his peculiar knowledge and skill so acquired in competition with plaintiff, and threatens to, and will, unless restrained by the court, continue to carry on the same to the great and irreparable injury of plaintiff; and that such acts in violation of the contract are a continuing injury to, and an interference with plaintiff's business, and prevents its establishment, and greatly reduces its profits. And plaintiff cannot be fully compensated in damages; and defendant is wholly irresponsible financially, without property that can be reached by process of law, and an action at law would be useless and vain, and wholly inadequate to compensate for damages and injuries to plaintiff, resulting from the violation of the contract.

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Plaintiff asks the court to enjoin defendant from carrying on said business in Zanesville, either in his own name, or in the name of any other person, or persons, and from endeavoring to induce any person or persons, who are customers of defendant, to cease or abstain from buying oil or gasoline from plaintiff, or its successors, or assigns, and from doing any and all other acts in violation of said contract, and for such other and further relief, as is just and equitable.

The answer of defendant admits that he signed the contract; that he was engaged in selling oil and gasoline in Zanesville to consumers, from October 1, 1896, to September 25, 1897, and since has continued to sell for another company than plaintiff; admits that defendant has acquired an acquaintance with, and knowledge of customers who had purchased oil of plaintiff; that defendant has no property subject to execution; but denies each and every other allegation of the petition; and avers that a week before leaving plaintiff's employment, he notified his employer of his intention to leave said employment, and during the week following, took the man employed to take his place in such employment, over the route in Zanesville, where he had theretofore sold oil and gasoline, and showed him every customer, and told the customer that this was the man who would succeed him in the employment; and gave his successor all bills and papers in his possession pertaining to the business, which included the names of all of the customers; and advised the customers that he had ceased said employment, and that another had taken his place, and would be to see them; that the defendant is largely engaged in selling an oil different from that sold by him, before September 25, 1897, and largely to new and different customers; that said employment does not require any great or special skill and knowledge; that the services are not peculiar or extraordinary in character; and that since September 25, 1897, plaintiff has been aware of defendant's present employment and its character.

The reply denies that defendant is now largely engaged in selling an oil different from that sold by him before September 25, 1897, or largely to new or different customers. It denies that the employment does not require special skill or knowledge, and that the services are not peculiar or extraordinary in character, and denies that it, has, since September 25, 1897, been aware of the character of defendant's employment.

The case was heard on evidence, and I find the facts to be, that defendant did make the contract and enter the employment of plaintiff as alleged, and did before the expiration of the time agreed upon, quit the employment of plaintiff as alleged, and against plaintiff's wish that he remain. That he did acquire knowledge not only of the customers of plaintiff, but of the business, which required acquaintance with the various grades, and qualities and prices of oil and gasoline sold; and also, acquaintance with the knack of burning the oil and gasoline in lamps so as to prevent the smoking of lamp chimneys; that the employment is peculiar and special, but does not require special or extraordinary ability, but only ordinary ability to acquire; that the knowledge of character, and grades, and prices, of oil, is easily acquired by a man of ordinary mind and attainments; and the fixing of lamp chimneys so that they will not smoke when burning the oil or gasoline sold, is not an art, requiring expert management, but a "knack" requiring some readiness and dexterity perhaps, but not more than is possessed by men of ordinary intelligence, and having ordinary use of eyes, hands, and fingers.

I also find, that the knowledge of the business acquired by defendant while in plaintiff's employment, was not acquired confidentially, or in confidence, and that no secrets of business were imparted to him or betrayed by him; that he did notify plaintiff that he was going to leave, and did show the man designated by plaintiff to succeed him, the route and customers, and turned over books and papers to his employer as alleged; but that the oil or gasoline he now sells, is not substantially different from that sold for plaintiff by him, and that he is now working for a rival company of plaintiff, selling illuminating oil, substantially the same.

I also find from the evidence, that many of the customers of plaintiff, ceased to be its customers after defendant left its employment; that the man who took his place in the route, had gathered up new customers, but had not at the date of this trial, leveled up the business; that the new man's sales were less (at the time of this hearing) than defendant's, by 100 to 125 gallons a week. Whether defendant could have held his customers for any particular length of time, or whether the new man would equal him, or surpass him, in customers in time, does not appear. Defendant began the work for the rival company, September 25, 1897; the hearing of the case was on October 14, 1897.

The question whether or not a court of equity will grant its aid, must depend upon the circumstances of each particular case. And in this case the question is narrowed under the pleadings and evidence, to this:

Ought the court to interfere to aid the employer where the contract sought to be enforced, permits it to discharge the employee at any time, for any reason, and yet continue its control over him, (to the extent of preventing him working for a rival company in Zanesville), for one year after such discharge?

The question is narrowed to this, because the evidence shows defendant has done all he could do to prevent injury to plaintiff, resulting from his quitting its employ, save and except working for its rival. He has done what he could do to turn over to the plaintiff the route he established, and the customers he had gained while working for it. If he had not done that, the case might not turn, as I think it does, in the consideration of the contract of the employment itself, and the application of those equitable principles which should govern such a contract.

Consider this contract of employment. It permits the employer to discharge the employee, "for whatever reason at any time," and still continues control over his working in one of the ways he might otherwise work for a full year's time after such discharge.

Is that fair? Is it not oppressive? Cannot a stipulation be devised that will afford the necessary protection to plaintiff's business and at the same time restrain defendant less?

If the contract had provided that only if Familton left his employment he should be so controlled and restrained, or was discharged for cause, all reasonable, necessary protection to plaintiff's business would have been afforded, and Familton been much less restrained.

Familton would then have encouragement to be, and continue efficient and faithful; and the Paragon Oil Company would be constrained only to continue him in its employment till the end of the time contracted for (long or short); or, if choosing to discharge him without cause, forego all control over him after discharge. This contract not only permits discharge "for whatever reason" at any time—however well

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Familton found himself adapted to the business, however well he pleased customers and the company—but holds on to him a year after such unjust, uncalled for, discharge.

It is said, "If the company had unreasonably exercised that legal power, no court of equity would grant it an injunction;" and that "such an unreasonable discharge would be held satisfactory evidence that the contract was not made in good faith for the protection of the company's business.

But does that answer the objection that nevertheless the "legal power" to act in such an unreasonable manner, to make such an unreasonable discharge, is a part of the contract itself; is embodied in the very contract which this action is brought to have the court specifically enforce. And the question remains: Does not the embodying of such "legal power," a power that may be exercised unreasonably under sanction of the very contract itself, so taint the entire contract that equitable aid ought not to be given to its specific performance.

Plaintiff's legal right to damages because of defendant's working for the rival company, is unquestioned. Plaintiff may obtain its judgment against defendant and hold it over him for his life-time. That legal right is clear enough under the contract. But would it not be harsh and unreasonable to stop him from his work in addition? It is familiar, equitable doctrine, that "equity will not aid in the harsh assertion of a legal right." The contract permits the same restraint on defendant if he is turned off without cause, as if he left of his own volition.

This seems to be unfair and oppressive. It more than fairly protects the interests of plaintiff; and in that respect is not alone harsh and unreasonable upon defendant, but interferes with the interests of the public by making it possible (if this contract may have equitable aid), for an employer, under cover of such a contract as this, to deprive a laborer of the opportunity of earning his living in his chosen way for a year, without sufficient cause.

Under this contract there is no room to imply anything. It is an express contract. It is express that for "whatever cause" defendant quit service he may be restrained; so that I think it cannot be maintained that the cause of his dismissal from service must be a just and reasonable cause. The sufficiency of the reason is left to plaintiff, under the terms of the contract.

The fact that plaintiff did not discharge defendant, is, I think, immaterial to the question: Shall the negative portion of this contract be enforced by prohibitory injunction? The contract itself, and the contract alone, must be looked to to determine, if by its terms it is fair or oppressive. If, looking to the contract alone, it appears that it gives power which may be exercised to oppress, unreasonably, equity will not lend its aid to enforce such contract, although the part which is oppressive and unreasonable, has never in fact been so exercised. It is enough if the contract is bad in that respect.

Another reason why this injunction ought not to be granted, is the slight good it will do plaintiff in comparison with the injury that it will do defendant. The evidence shows that Norman is gaining new customers; he has taken the route quite recently; there is no evidence leading to the belief that he will not continue to gain business; if so, plaintiff will lose nothing so far as a change of drivers can affect its business. On the other hand, defendant would be, for a time at least—until he gets other work—without the means to labor for the support of himself and family.

In *Sternberg v. O'Brien*, 48 N. J. Eq., 370, Judge Baldwin gives that as a reason why an injunction should "never be granted." He says: "The rule is fundamental that an injunction should never be granted when it will operate oppressively or contrary, to the real justice of the case, or when it is not the fit or appropriate method of redress under the circumstances of the case—or when the benefit it will do the complainant, is slight in comparison to the injury it will do the defendant. The great office of the writ is to protect and preserve—not to destroy."

Now, when we recall the evidence which is uncontradicted—that defendant notified plaintiff of his intention to quit its service, and that he thereafter showed the new man over the route, calling on each customer, telling them:—"this is the new man who is to take my place," and turned over his list of names of customers and books of accounts; that the new man has already gained new customers, and is within 100 to 125 gallons per week of leveling up the business of the route; and that the only injury really to be complained of, is defendant's working for the rival company—the injury that could do to plaintiff, seems trivial to that of depriving defendant of the opportunity of earning his livelihood in working for the rival company.

The evidence does not establish that he took with him to the rival concern, any secrets of the business of plaintiff; that he ever had any confidential relations with plaintiff which he betrayed to the rival company. If the evidence had shown either, a different case would be presented. He had nothing to disclose but what he did disclose and turn over to the new man for the plaintiff's benefit.

All he took to the rival company was his knowledge gained of the business, which he could not return to plaintiff, and his use of head and hands in the new employment. In *Mandeville v. Harman*, 42 N. J. Eq., 185, the court says: "It is one of the natural rights of every citizen of this state, to use his skill and labor in any useful employment, not only to get food and raiment and shelter, but to acquire property, and I think it may be regarded as very certain, that the courts will never deprive any one of this right, or even abridge it, except in obedience to the sternest demands of justice."

I do not think the demands of justice require me to enjoin defendant from laboring for plaintiff rival company, and the writ is refused.

Nash & Lentz, and L. G. Addison, of Columbus, with Granger & Granger of Zanesville, for Paragon Oil Co.

Durban & McDermott, for defendant.

COAL LEASE—ADMINISTRATORS.

[Summit Common Pleas, October Term, 1897.]

DAVID WELTY, ADMR., v. CATHERINE WISE ET AL.

Where a coal lease provides that said lease shall "be good as long as there remains coal unmined," and the lessee under such lease fails for the period of eleven years to operate under such lease: Held, that the lessor and those claiming under him have a right to presume that the lease has been abandoned; and, therefore, the lessor's administrator will be entitled to sell such land free and unincumbered from this lease, to pay the debts of decedent.

NYE, J.

This case comes into this court upon appeal from the probate court. The action in the probate court was an action by the plaintiff, David

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Welty, as administrator of John Wise, to sell certain land, and the heirs and one Joseph Heckman, are made parties defendant. Substantially the only controversy in this case is with reference to the claim made by Joseph Heckman.

Joseph Heckman claims that on May 10, 1866, the decedent, John Wise, made and executed to Elias Heckman, a lease of the coal interests in his farm, for an indefinite period, and he sets forth in his answer a copy of this lease or license as one of the parties call it, and one of the contentions here is, that this was a license by the plaintiff to defendant; one of the parties claiming that it is a lease, and the other claiming that it is a license, and they spent considerable time in the discussion of the law pertaining to licenses and leases.

I am not going to decide this case upon the distinction made by counsel as to whether it is a license, or whether it is a lease.

The only question in this case that is in controversy is whether Joseph Heckman has a lien upon this property, or whether he has not. This is the paper which the controversy is about:

"May 10, 1866.

"This article of agreement made and entered into by and between John Wise of the first part and Elias Heckman of the second part, witnesseth:

"That said John Wise doth hereby lease and let unto the said party of the second part the land and tenements situated in the township of Green, section twenty-four, county of Summit and state of Ohio, consisting of one hundred acres, for the following considerations:

"That said second party shall have the full right and liberty to enter upon, dig, bore, mine and make all necessary excavations upon any and all portions of said lands and tenements and then and there to erect any and all buildings, machinery and fixtures, and do any and all acts upon said premises which said party of the second part deem necessary for the successful prosecution of the above specified business in any and all of its branches.

"And the said party of the second part doth hereby agree to pay seventeen cents per ton for lump coal and six cents per ton for slack yearly so long as there is no railroad within one-half mile of the aforesaid premises. But so soon as there is a railroad built within one-half mile, the party of the second part agree to pay twenty-two cents per ton.

"Also if coal is mined by said party, their heirs or assigns, this lease to be good as long as there remains coal unmined.

"Said party of the second part also agrees to incur all the expenses of labor, materials, and machinery necessary for the prosecution of said above specified business. And it is mutually agreed between the said parties, that the aforesaid premises shall be used and occupied by the said party of the second part, for the purposes above specified, with as little damage to the surface of said premises as will be consistent with the interest of said party of second part, and also, that the said party of the first part shall have the right to enter upon said premises, and to use and occupy the same during the continuance of this lease for every and all purposes not inconsistent with the rights herein granted to the party of the second part. Also that the party of the second part agrees

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not to mine coal within five rods of any of the buildings on aforesaid premises.

"In witness whereof, we have hereunto set our hands and seals this nineteenth day of May, 1866.

"Witnesses,

"H. G. JOHNSON,

JOHN WISE, (Seal.)

"ALEXANDER JOHNSON.

ELIAS HECKMAN, (Seal.)

"The State of Ohio

"Summit county.

May 19, 1866.

"Personally appeared John Wise and Elias Heckman who acknowledged that they did sign and seal the foregoing lease and that the same is their free act and deed. Alexander Johnson, Justice of Peace."

The proof in this case shows that Elias Heckman got this lease in 1866; that he opened up this mine and worked it until May, 1875; that Mr. Elias Heckman at that time became financially embarrassed. He was indebted to his brother, Joseph Heckman, in the sum of fifteen hundred dollars, and it was agreed, that this lease should be assigned to Joseph Heckman for the consideration of one thousand dollars.

The proof shows that Elias Heckman put into the coal mine about five thousand dollars; he got out of it about three thousand dollars, that it was to him a losing concern from the time he opened it until he quit. The proof then shows further that Joseph Heckman ran this coal mine from 1875 until 1886, and proof was given as to the amount of money that he paid royalties to Mr. Wise. The undisputed testimony in the case shows that from 1886 to the present time, no coal has been taken out of the mine; there was one opening upon one side of the hill and another upon the other and a way clear through the hill, both of those openings have caved in, the ground has fallen down where the coal was taken out, so that it has left a cavity or depression upon the top; that nothing further has been done in this matter since 1886, a period of eleven years.

In Ohio we have not very many authorities upon this question of leases for minerals. The only case that I have been able to find is one decided by the circuit court of the fifth circuit. *The Ohio Oil Co. v. Hurlburt et al.*, 7 Ohio Circ. Dec., 321. Judge King delivered the opinion, in which, the syllabus of the case is this:

"Where a land-owner gives a lease for all the oil and gas under his land, the lease providing that the lessee should pay \$160 a year for every year he failed to operate under the lease, without other provisions as to forfeiture, it is the duty of the lessee not to delay the development and operations under the lease for any unreasonable length of time, and if there is unreasonable delay, the lessor may insist that the lessee either sink oil wells, or abandon the premises, notwithstanding the payment of \$160 every year. But if the lessor fails to avail himself of such unreasonable delay to forfeit the lease until after the lessee has again, with his consent, commenced operations and sunk wells on the land, the right of the lessor to insist on a forfeiture for the previous unreasonable delay, is waived."

There is a West Virginia case found in the 18th South Eastern Reporter, 493, and I read from the syllabus of the case: "Where a lease is executed to a party of all coal, timber, and mineral privileges on a certain tract of land, for the term of ninety-nine years, thence ensuing, the lessee agreeing to pay ten cents per ton for the coal mined and shipped therefrom, and for all such timber as said lessee may think mer-

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chantable, which may be cut, shipped, sawed, or moved from said leased premises, fifty cents per 1,000 square feet of lumber of inch thickness, and a proportionate sum for other thicknesses, or twenty-five cents per tree, at the discretion of said lessees or their assigns, no time being fixed for the commencement of operations, the lessor has a right to presume that said operations will be commenced in a reasonable time.

"2. If nothing has been done under said contract for the period of seventeen years from the date of the contract, the lessor has a right to presume the contract has been abandoned, and said lessee or his assigns cannot after having been guilty of such laches, restrain said lessor from cutting and using the timber on said land by enjoining him from cutting and removing the same."

Farther on in this case, in the decision of the court, on page 497, the judge deciding the case says: "In making this agreement to lease the coal mentioned therein, and to let the lessor have the timber to aid in its safe and economic mining, it is presumed that said David Bell expected to receive some returns in the shape of royalty during his natural lifetime; and, although the agreement provides that the lease is to continue for ninety-nine years, the law contemplates that operations shall be commenced in a reasonable time, in order that the lessor may enjoy his royalty, and the lessee the coal."

And in this last cited case the court cites a case in the 83 Va., 409, found in the 2 S. E. R., 713, in which that court says: "The lease was for a term of twenty years. Yet, looking to its nature and object, it cannot be contended that the lessees had the option to work or not to work the ore mines for an indefinite time, and thus convert what was designed to yield a handsome daily income to the lessors into a mere barren incumbrance on his land—a cloud on his title, an incubus and a manacle which would oppress him and destroy the marketable value of his land."

Now, I am of the opinion that it was the fair contemplation of the parties to this lease in question that this mine should be worked, and that the lessor should have the revenues from it, and when it ceased to be worked for an indefinite length of time, or for a long time, Mr. Wise had a right to presume that the lessee had abandoned it; and I think the proof clearly shows that this lease has been abandoned, and that this land ought not to be encumbered by a barren lease without any equity or right upon the part of the lessor or his heirs to have it declared forfeited.

I think justice requires in this case that this lessee or the assignee of this lease should either work the mine or abandon it, and it having been abandoned for the period of eleven years, without any attempt to work it, I think that this land should be sold free from any incumbrance of this lease.

The order may be taken to sell this land free and unincumbered from this lease, to pay the debts of the decedent.

PARTNERSHIP—ADMINISTRATORS.

[Summit Probate Court, November 1, 1897.]

IN RE ESTATE OF JOHN ROBB, DECEASED.

1. Where there is no joint estate for distribution and no living solvent partner, the joint creditors share *pro rata* with the separate creditors in the individual estate of one of the partners.
2. A creditor of an insolvent estate being entitled to the whole of a certain fund, which the administrator refused to pay, is entitled to interest on such sum which has accrued thereon, pending litigation concerning its payment between the administrator and such creditor.
3. Funds of an insolvent estate in the hands of an administrator are subject to taxation.

ANDERSON, J.

Ellsworth E. Otis is the administrator *de bonis non* of the insolvent estate of John Robb, deceased, and his application herein prays for an order directing the distribution of the funds in his hands.

John Robb was a member of Meahl, Robb & Company, an insolvent co-partnership composed of John Robb, Jacob Meahl and John Cook. Meahl and Cook are both insolvent, and the partnership assets will pay but three and three-tenths mills on the dollar. The administrator has a fund of \$3,825.77 for distribution, and the creditors of the Robb estate claim that they are entitled to the entire fund to the exclusion of the partnership creditors, who, on the other hand contend that they have a right to share equally with the individual creditors in this fund; that in any event, the individual creditors can exclude them only from so much of this fund as equal the percentage received by them from the partnership assets.

Various rules have been adopted by the American courts as to the distribution of the joint and separate assets of insolvent partnerships and partners. A number of authorities support the rule that the partnership creditors are confined to the joint assets; that they cannot resort to the individual assets until individual creditors are satisfied, even if there are no joint assets. *Murrill et al. v. Neill et al.*, 8 Howard, U. S., 414, 418.

In Kentucky the rule is that the joint creditors must first exhaust the partnership assets; the individual creditors are then entitled to an equal dividend from the separate estate, after which, both the joint and separate creditors share *pro rata* in the balance of the individual estate. *Bank v. Keyzer*, 2 Duvall, 169; *Bank v. Kenney*, 79 Ky., 133.

Again it is said that joint creditors may first exhaust the joint assets, and then share *pro rata* with the individual creditors in the separate assets. 19 Vt., 292. *Cox v. Miller*, 54 Texas, 16; *Camp v. Grant*, 21 Conn., 41.

Whatever may be said of the equity of such a rule, it is to be observed that it more nearly follows the analogies of the law than any other. At law the partnership creditors may have judgment against the individual members of the partnership, and obtain satisfaction from the individual property, but though the separate creditor can levy on partnership property, his lien is subject to the payment of partnership debts.

Still another rule prevails. Where there are joint and separate effects for distribution, the joint creditors can in equity only look to the

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surplus of the separate estate of a partner after the payment of his individual debts, and the individual creditors can in equity only seek distribution from partnership effects out of the surplus of the joint fund after payment of the partnership debts. But where there is no joint estate for distribution and no living solvent partner, the joint creditors share *pro rata* with the separate creditors in the individual estate. This is the rule in Ohio. *Rodgers v. Meranda*, 7 O. S., 179, 191; *Grosvernor v. Austin*, 6 O., 104.

If it is an equitable rule which confines the partnership and individual creditors to the joint and several assets respectively, it is a little difficult to see why the joint creditors should share in the individual assets when there are no joint effects, but such is the rule. *Brock v. Bateman*, 25 O. S., 609.

At the close of the opinion in the case last cited, Welsh, J., says: "What should be the rule where the partnership assets are insignificant, or where they will yield to the creditors of the firm a less dividend than the creditors of the individual members would realize from the individual assets, and whether the creditors of the firm should in such case be confined to the partnership assets, we are not called upon, in the present case, to decide."

Here is an intimation that if the partnership assets are insignificant, the court may enlarge the rule for the benefit of joint creditors. However, in *Clapp v. The Banking Co.*, 50 O. S., 528, 529, 541, the joint assets were about four per cent., but the court did not consider this as insignificant.

In the present case, however, a dividend of only three and three-tenths mills can be paid to joint creditors. A partnership creditor having a claim of \$1,000 would receive a dividend of \$3.30, but a creditor having a \$3.00 claim would receive nothing. There is a great number of joint creditors with claims large and small, and since some of these can receive no dividend whatever, the court is constrained to apply the maxim "*De minimis non curat lex.*" Since the proper distribution of so small a fund is impracticable, there is every reason for saying that there are no joint effects.

It is believed that the Kentucky rule is the most equitable, but we will be obliged to dispose of this case in accordance with the decisions of our Supreme Court in the cases before referred to, and therefore, there being no living solvent partner, the joint creditors under the Ohio rule (or rather the exception to the general rule), are entitled to share *pro rata* in the individual assets with the separate creditors.

Second—The second question for solution arises upon the following state of facts: Stephen Ginther, the first administrator of the Robb estate, was ordered by the probate court to pay the Citizens' Savings and Loan Association \$409.83, which sum resulted from the sale of real estate upon which the bank claimed a lien. Mr. Ginther declined to abide by the decision of the lower court and litigated the question through all of the courts of the state, the judgment of the probate court being affirmed by the Supreme Court and all the intermediate courts. Interest amounting to \$122.95 has accrued upon this claim pending the litigation, and the bank claims a preference over the other creditors to that extent, while they insist that the bank must be *pro rata* with them. If the administrator had complied with the order of the probate court, this question of interest would not have arisen; he saw fit, however, to litigate the question, and in so doing he represented all of the creditors.

This interest claim is a demand existing against the administrator as such, and it stands upon an entirely different footing from a claim which originally existed against the deceased. The administrator could not escape paying the costs made by this litigation in full, and neither can he avoid payment of this interest. The bank is entitled to this preference, and the interest must be paid in full. If the administrator prosecuted this litigation captiously, the creditors have their remedy against him and his sureties.

Third—Is the fund in the hands of the administrator taxable? He has listed it for taxation, but the estate being insolvent, and the Supreme Court having decided in *McNeil v. Hagerty*, 51 O. S., 255, that funds in the hands of an assignee for the benefit of creditors of an insolvent debtor cannot be taxed, he asks for instructions upon this point.

An examination of this case shows that the Supreme Court based its ruling upon a construction of the statutes relating to assignments and to other trustees, and not upon the fact of the insolvency of the estate. In commenting upon the legislation bearing on this question the court says, on page 264: "All taxes of every description assessed against the assignor upon any personal property held by him before his assignment, shall be paid by the assignee or trustee out of the proceeds of the property assigned, in preference to any other claims against the assignor. Nowhere is it in terms provided that the assignee shall list the property for taxation, nor is provision made for the payment of any taxes save those existing against the assignor. This omission seems to us significant when contrasted with the duty enjoined by other sections of the statute upon other trustees. By sec. 2734, returns must be made of the property of every ward by his guardian, of every estate of a deceased person by his executor or administrator, etc. It is made the duty of every executor or administrator to apply the assets to the payment of debts in the following order: fourth—Public rates and taxes and sums due the state for duties on sales at auction."

"Again, on page 265 the court says: The omission referred to would seem also to suggest a distinction between the relation of an assignee to creditors of the assignor and to the trust property held by him, and the relation sustained by a guardian, an administrator or a receiver of a corporation. As to administrators, it is true that property in their hands is subject to the payment of the debts of the decedent, and that creditors are expected to list their claims as credits, and often it happens that the debts consume the entire assets, but usually there is in fact as well as in contemplation, a residue going to widows and legatees, or heirs, and they are not required to list for taxation any amount until it is actually received."

This argument of the Supreme Court seems to settle the question beyond dispute and the administrator will be required to pay the taxes on the funds in his hands.

FREE TURNPIKE ROAD ACT—JURY.

[Gallia Common Pleas.]

JOHN N. WARD V. STATE OF OHIO.

1. In a prosecution for the violation of the act of April 20, 1894, (91 O. L., 162), or any regulations duly made and prescribed by the board of county commissioners in pursuance thereof, making it a misdemeanor for any person to transport a burden in excess of a certain weight in a vehicle with tires under a certain width: Held, that mayors of cities not having a police court have final jurisdiction to hear and determine such prosecution, without the intervention of a jury.
2. The accused in a prosecution of this kind is not one which by the constitution entitles him to a trial by jury. It is an offense created by statute, punishable by fine only, and not known to or punishable at common law.

COULTRAP, J.

This is a proceeding in error brought to reverse the judgment of the mayor of the city of Gallipolis. The certified transcript of the record shows that on January 23, 1897, James Hunt, one of the commissioners of Gallia county, made and filed with the mayor of said city an affidavit charging John N. Ward, the plaintiff in error, with unlawfully transporting a burden of about 5,700 pounds over one of the free turnpike roads of said county on a vehicle having tires not more than four inches in width, in violation of the act of the legislature passed April 20, 1894, 91 O. L., 162, and the regulations prescribed by the commissioners of Gallia county in pursuance thereof, requiring wagons in which burdens of more than 4,000 pounds were transported to have tires five inches and more in width.

Upon the affidavit being filed, a warrant was issued for the arrest of Ward, he was brought in, arraigned and plead not guilty. Thereupon the mayor proceeded to try the case, the evidence was heard, and the accused was found guilty and sentenced to pay a fine of five dollars and costs and to stand committed until the fine and costs were paid or until he was discharged according to law. The transcript of the record is entirely silent as to whether the accused waived a jury or not, and the mayor seems to have proceeded to the trial of the case upon the theory that he had final jurisdiction of the offense, and that accused was not entitled to a trial by jury.

Ward now seeks to reverse this judgment and sentence. His petition in error contains numerous assignments of error, but they are in reality only two: 1. That the offense, being committed outside of the corporate limits, was not within the jurisdiction of the mayor. 2. That the offense charged was one which entitled the accused to a trial, and was not one of which mayor had final jurisdiction.

By the provisions of sec. 1816 and 1817, Rev. Stat., the mayor, in cities other than those which have a police court, is given jurisdiction in cases of misdemeanors co-extensive with the county. The only question therefore to be considered is whether the offense charged in the affidavit was one of which the mayor had final jurisdiction and which he might hear and determine without the intervention of a jury.

Section 1817, provides that he (the mayor in cities not having a police court) "shall have final jurisdiction to hear and determine any prosecution for a misdemeanor, unless the accused is, by the constitution, entitled to a trial by jury."

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And section 1818 provides that "he shall have such jurisdiction, notwithstanding the right to a jury, if before the commencement of the trial, the accused waive a jury trial." By this latter section the jurisdiction of the mayor to hear and determine the case is made to depend upon the waiver of a jury before the commencement of the trial. The waiving of the jury is therefore a jurisdictional fact which should appear affirmatively in the record. "None of the proceedings essential to the jurisdiction and the foundation of the judgment of the court can be waived." *Fouts v. State*, 8 O. S., 103. The record being silent as to whether the accused waived a jury or not, it follows that the mayor did not have final jurisdiction to hear and determine the prosecution of the charge against the plaintiff in error, if the case was one in which the accused was by the constitution entitled to a trial by jury.

But was the accused entitled by the constitution to a trial by jury? Section 1817 does not deny to mayors of cities having no police court final jurisdiction in all prosecutions for misdemeanors committed within the limits of the county, but only in such as by the constitution the accused is entitled to a jury. Was the offense for which the plaintiff in error was tried of that character? The act under which this prosecution was had makes all persons violating said act or any regulations duly made and prescribed by the board of county commissioners in pursuance thereof, guilty of a misdemeanor, and it provides that on conviction they "shall be fined not less than five dollars nor more than fifty dollars, and shall be imprisoned until the fine and costs are paid," etc. Imprisonment is no part of the penalty, but is authorized only as a means of enforcing the payment of the fine and costs.

The provisions of the constitution relating to trial by jury are secs. 5 and 10 of article 1. Section 5 provides, "The right of trial by jury shall be inviolate." In discussing this provision of the constitution in *Inwood v. State*, Judge McIlvaine says, "it is settled beyond further discussion, that this clause in the constitution was not intended to enlarge or modify the right of trial by jury. Its sole purpose was to guaranty the perpetuity of the institution, as it then existed and as it has long existed at common law." The other provisions of the constitution referred to is that which guarantees to every person accused of the commission of crime a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. Of the offense mentioned in this clause of the constitution, Judge McIlvaine, in the same case, at page 189, says, "It is such an offense as would, before the adoption of the constitution, have entitled the accused to a jury trial."

It is settled also that the common law rule in regard to the right of trial by jury was not changed by the constitution. In *Wood v. State*, *supra*, and authorities therein cited.

It only remains therefore to inquire in what cases the right to a trial by jury did not exist at common law, and whether or not the offense for which the plaintiff in error was tried and convicted belonged to that class.

The authorities make a distinction between offenses strictly criminal or infamous, and which can only be punished through the medium of an indictment or presentment of a grand jury, and offenses created by statute and which are only *quasi* criminal. In the former cases, the accused had the right at common law to demand a trial by jury, and the same right exists under the constitution. But in the latter cases no such

right existed at common law, and, as the common law rule was not changed by the constitution, it does not exist under that instrument, where the penalty is a fine only and where imprisonment is authorized only as a means of enforcing the payment of the fine. Embraced in this class of offenses, are the numerous offenses found upon our statute book which are punished by fine only, and which are merely violations of the police regulations of the state, as for instance Sabbath breaking, selling spirituous liquors on Sunday, and the disturbance of religious meetings. *Markle v. Akron*, 14 O., 586; *Wightman v. State*, 10 O., 452. Likewise for a stronger reason, because not immoral and less mischievous in their tendencies, included in this class are violations of the statute requiring persons driving a vehicle of any description upon the public highway, on meeting another vehicle, to keep to the right and leave half the road free, and violations of the statute making it a fineable offense to ride or drive faster than a walk over any free county bridge having placed upon it by the commissioners of the county a caution notice according to law. These statutes are mere police regulations made to protect the public highways and to govern the action of persons using them, and their enactment was a legitimate exercise of the police power of the state. *Cooley's Constitutional Limitations*, page 727.

Analogous enactments are the numerous statutory regulations with respect to railroads and the running and operation of trains upon them. These statutes are in the nature of police regulations necessary for the protection of the lives and property of the citizens of the state, and their validity is sustained on that ground. *R. R. Co. v. R. R. Co.*, 30 O. S., 604-610. There is nothing in the offenses defined in any of them of a strictly criminal or even of an immoral nature. They are offenses only because made so by statute—in other words they are *malum prohibitum* and not *malum in se*, offenses penal by statute but not at common law. Wharton's *Crim. Law*, secs. 23-24. This class of offenses may be made indictable, or they may be made punishable in a summary way without indictment. They may be punished by both fine and imprisonment, in which case the accused is entitled to a trial by jury, or they may be punished by fine only, in which case the right of trial by jury does not exist and mayors of cities, not having a police court, and of villages are given final jurisdiction.

Applying these principles to the case at bar, it seems clear that the charge upon which plaintiff in error was tried and convicted was not one which, by the constitution, entitled him to a trial by jury. It was an offense created by statute, punishable by fine only, and not known to or punishable at common law. The act of transporting a burden of any weight in a vehicle with tires of any width over a free turnpike road is not wrong in itself. It is only wrong because the legislature of the state, in the exercise of its police power, has made it unlawful for persons to transport over these roads burdens beyond a certain weight in vehicles having tires under a certain width. It was therefore only *quasi* criminal, and the mayor of the city of Gallipolis, it being a city having no police court, had final jurisdiction to hear and determine the prosecution without the intervention of a jury.

In many cases, the statutes which define and punish by fine violations of these police regulations, expressly confer upon magistrates or mayors of cities and villages final jurisdiction to hear and determine the prosecution and to impose the fine. But it seems to me that is wholly

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unnecessary, as the jurisdiction conferred by the general statutes of the state, in this case by sec. 1817 is ample in that regard.

Judgment of mayor affirmed at costs of plaintiff in error.

ASSIGNMENT FOR CREDITORS—ERROR.

[Licking Common Pleas, December 4, 1897.]

***IN RE ASSIGNMENT OF JOHN W. JONES.**

1. Where the owner of certain real estate conveys the same by deed, to third persons as trustees, which deed provides that such trustees are to convert the real estate into money and pay all liens upon said premises in the order of their priority, and to distribute the balance to the creditors of the grantor, making equal distribution among them so that no preference shall be given to one individual creditor over another: Held, that such deed, is a deed of assignment for the benefit of all the creditors of such grantor, and comes within the purview of the statute of Ohio relating to insolvent debtors.
2. The act governing voluntary assignments, commencing with sec. 5335, Rev. Stat., is a special act, made especially applicable to assignments for the benefit of creditors, and being a special act making special provisions for deeds of assignment to be controlled by the probate court, it becomes exclusive and deprives all other courts of jurisdiction of such deeds.
3. An assignee is a trustee in every case. A trustee is one to whom property is committed in trust, whether for some specific use or for the benefit of general creditors; a trustee is also an assignee when the property held in trust by him has been assigned to him.
4. A deed of assignment in the ordinary form, conveys a trust estate to the assignee and it is his duty under the statute to file the deed in the office of the probate court of the proper county, within ten days, give a sufficient bond, and proceed to administer the trust, and after paying the debts of the assignor and costs of administration, the residue is paid to the assignor.
5. The fact that this deed was drawn in the form in which deeds of assignment are usually drawn, and the further fact that the assignees are called "trustees," and the stipulations in the deed, as to the disposition of the property and the distribution of the proceeds arising therefrom, including the payment to the trustees of a reasonable compensation for their services, which are only the provisions of the law in matters of assignment, will not operate to change the character of the instrument.
6. Where such deed purports to convey all the property of the assignor, for the benefit of his creditors, that fact alone carries with it the presumption that he was unable to pay his debts; that he was insolvent, and, like all assignors for the benefit of their creditors, made the conveyance to relieve himself from the pressing demands of his creditors, and to discharge his obligations, so far as his property would do so.
7. An order of the probate court removing an assignee of an insolvent debtor, is not a final order from which error can be prosecuted by such assignee. He has no substantial personal or property right to be affected by his removal. He has no interest in the administration of the estate except to perform his duties according to law and the order of the court.

WICKHAM, J.

This is a proceeding in error brought in this court to reverse the order and judgment of the probate court of this county.

The history of the case, as shown by the record, is as follows: On January 19, 1897, John W. Jones, a citizen of Delaware county and resident of Radnor township, executed and delivered to James W. Gallant and Stephen C. Thomas of Delaware county and Charles M. Wambaugh

*The judgment in this case was affirmed by the circuit court, December 18, 1897.

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of Columbus, Franklin county, certain deeds conveying to them about twelve hundred acres of land, situated and lying in the counties of Delaware, Marion and Franklin, and of which the said John W. Jones was then the owner.

The deed for the Delaware county land, omitting the description of the several tracts, which amount in all to about six hundred acres, reads as follows:

"Know all men by these presents: That I, John W. Jones, of the county of Delaware, and state of Ohio, in consideration of the sum of one and no one-hundredths dollars to me paid by James W. Gallant, of the county of Delaware, Steven C. Thomas, of the county of Delaware, and Charles M. Wambaugh, of the city of Columbus, county of Franklin and state of Ohio, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey to the said James W. Gallant, Steven C. Thomas and Charles M. Wambaugh, as trustees for the purposes hereinafter mentioned, their successors and assigns forever, the following real estate, situated in the county of Delaware, in the state of Ohio, and bounded and described as follows:

(Here follows a description of the property conveyed.)

"To have and to hold said premises, with all the privileges and appurtenances thereunto belonging, to the said James W. Gallant, Steven C. Thomas and Charles M. Wambaugh as trustees, their successors and assigns forever. This conveyance being made to the said James W. Gallant, Steven C. Thomas, and Charles M. Wambaugh as trustees for the following purposes, to-wit: Said trustees to take immediate possession of said lands, subject to existing leases, to collect all rents, income and profits arising from said lands and tenements, and to sell the same in such lots and parcels as they may deem best, whenever such sales can be made to the advantage and interest of my creditors, and said trustees are authorized and empowered to execute deeds to the purchasers of said lands whenever sales are made by them with or without covenants of warranty as they may deem best, and to give such time for the payment of the purchase money to the purchasers thereof as they may think proper, provided said deferred payments are secured by mortgage on the premises sold, and until said lands are so sold said trustees are hereby authorized to rent or lease the same in such manner as they may deem best to secure the best income therefrom. Said trustees are hereby authorized to pay all taxes and assessments levied upon said lands and tenements, and to make all necessary and proper repairs thereon, and out of the proceeds arising from the rents and profits and from the sale of said land and tenements, said trustees are hereby authorized and directed to pay and distribute the same as follows:

"First—To pay all liens upon said premises in the order of their priority.

"Second—To pay all my individual creditors as their claims are properly proven to said trustees, making equal distribution among them so that no preference shall be given to one individual creditor over another.

"Third—To pay to the creditors of Miller, Jones & Company the amount which may be found due to them from me as a member of said firm, making equal distribution among them as their claims may be ascertained and determined.

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"Fourth—Whatever surplus may remain after the payment of all the above claims in lands or money, said trustees are to transfer or pay over to said John W. Jones, his administrators, executors and assigns. The said trustees are to have a reasonable compensation for their services and expenses in the execution of this trust, the amount to be agreed upon by the parties hereto, or fixed by a court having proper jurisdiction in the premises and the same to be paid as provided for before distribution or payment is made to any creditor as herein provided for.

"This conveyance is made at the same time with other deeds for grantor's land in Marion and Franklin counties to the same grantees so as to constitute one trust for said purposes, of all of grantor's property.

"And that I will forever warrant and defend the same with the appurtenances unto the said James W. Gallant, Steven C. Thomas, and Charles M. Wambaugh, their successors and assigns against the lawful claims of all persons whomsoever.

"In witness whereof the said John W. Jones has hereunto set his hand this nineteenth day of January in the year of our Lord one thousand eight hundred and ninety-seven."

This deed is properly signed, witnessed and acknowledged, and it was filed with the recorder of Delaware county for record on January 19, 1897, the day of its execution, and was recorded on January 25, 1897, in vol. 107, page 419, of the Records of Deeds of Delaware county.

On October 15, 1897, The Northwestern Mutual Life Insurance Company, a corporation, by Sayler & Sayler, its attorneys, filed its application in the probate court of Delaware county, alleging that it is a creditor of the said John W. Jones, and praying that the said Gallant, Thomas and Wambaugh, the trustees and grantees in the deed of John W. Jones, be removed, and that a trustee be appointed by the court to administer said trust under the statutes of Ohio relative to insolvent debtors. This application was set for hearing on October 22, 1897, by the court. Due notice was given to the said Gallant, Thomas and Wambaugh of the application and the time for the hearing thereof, and on October 22d, said trustees appeared in court and filed a demurrer to said application. The demurrer was heard by the court and overruled, to which the trustees excepted. And thereupon leave was given to the trustees to file an answer to said application *instantly* which was accordingly done. Thereupon the matter came on to be heard on the pleadings and the evidence, and the court reserved the decision of the questions made, until October 28, 1897.

On that day the court found that the said, The Northwestern Mutual Life Insurance Company was, at the date of the execution of the deed above mentioned, a creditor of the said John W. Jones; that on January 19, 1897, the said John W. Jones was then a resident of Delaware county, Ohio; that on said date he executed and delivered the deeds above mentioned; that the real estate conveyed by said deeds, was conveyed to the said trustees, in trust for the benefit of the creditors of the said John W. Jones; that said deeds were deeds of assignment under the insolvent laws of the state of Ohio, and that said trustees and each of them had failed to file the said deeds of assignment, or copies thereof, in the probate court of Delaware county, Ohio, and the said trustees and each of them had failed to give bond as said trustees, although more than ten days had elapsed since the execution and delivery of the said deeds to said trustees.

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And the court ordered and adjudged that the said trustees and each of them be removed as such trustees, and appointed John D. Van Deman, as trustee, to execute the trust, under and in pursuance of the statutes of Ohio relating to insolvent debtors. And the court further ordered that the original deed be filed in the probate court; which was accordingly done; and to all of which the said Gallant, Thomas and Wambaugh did then and there except.

Afterward, to-wit, on November 16, 1898, said trustees removed, filed their petition in error in this court and for error of the probate court, claim:

First—That said probate court had no jurisdiction of said subject-matter.

Second—That the said court erred in overruling the demurrer of the defendants below to said application.

Third—That the said court erred in not dismissing said application.

Fourth—That the said court ought to have rendered judgment in favor of these plaintiffs in error instead of against them.

Fifth—Other errors apparent on the record.

Thereupon, on the same day, came The Northwestern Mutual Life Insurance Company and filed a motion, and moved the court to strike from the files the petition in error and bill of exceptions, for the following reasons:

First—This court has no jurisdiction of the case over the said defendant in error.

Second—This court has no jurisdiction of this case over the subject-matter of said petition in error.

Third—This court has no jurisdiction to hear and determine any matter set up in the record from the probate court, and no error lies from the decision and order of the probate court removing said trustees.

It appears to us that the first question in its logical order presented by the record, is, Is the deed by which John W. Jones conveyed his lands to plaintiffs in error, a deed of assignment within the purview of the statutes of Ohio, relating to insolvent debtors?

Counsel for plaintiffs in error, contend that it is not a deed of assignment, but a deed of trust; and that the only way it can be declared to be a deed of assignment for the benefit of all the creditors of John W. Jones, is upon suit brought in this court to have it so declared, on the ground of fraud.

They contend that the law permits a debtor to convey his property to a trustee, for the benefit of his creditors, by such a deed as the one in this case, so long as it is not in fraud of creditors, and in support of their contention they cite the case of Hoffman, Burneston & Co. v. Mackall et al., 5 O. S., 124, where it is held: "Where a debtor, in contemplation of insolvency, makes an assignment or conveyance of his property to trustees for the benefit of all his creditors, at a time when a part of his creditors are expected within a few days thereafter to obtain judgment against him, is not *per se* fraudulent and void, upon the ground that the deed contains a provision which authorized the trustees to sell the property at private or public sale, and upon credit, as they shall deem most expedient and beneficial to the creditors."

"When a man finds that he has become insolvent, the most just and equitable act he can do is to surrender his property in trust for the benefit of all his creditors, and the hindrance and delay which such an assignment may occasion to the prejudice of particular creditors, seeking a

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priority of liens on the debtor's property by judgments at law, and speedy collections by sales on execution, are simply unavoidable incidents to a just and lawful act, and not being fraudulent in the contemplation of the law, do not bring the instrument of assignment within the operation of the statute of frauds."

They also cite Conklin & Shepperd v. Crum, 6 O. S., 612. The syllabus of that case is as follows:

"An assignment was made by an insolvent debtor, of his property, for the benefit of all his creditors, containing a provision, 'that the trustee shall sell and dispose of the property with convenient diligence, either at public or private sale, and for the best prices he can obtain therefor, for cash, or upon such terms of credit as he may deem advisable, to convert the same into money to the advantage for those interested in the premises, and to barter and exchange the same or any part thereof as he may deem proper for the benefit of the assignor, and to dispose of the same in any manner whatsoever, as freely and lawfully as assignor could do himself, which the trustee may deem advisable to do, tending in his opinion to convert the same into money directly or indirectly for the benefit of all interested under this assignment, and to collect all such debts and demands as may be collectible, and to settle, compound, and adjust, and to discharge the same for payment in cash or in property, or for part payment, only as aforesaid, any as well as all the claims and demands due, owing, or accruing due to said assignor, as well as all the claims in which the said assignor has any interest whatever, and finally to make at his discretion any such disposition of the property hereby assigned and transferred, or any part thereof, as the said assignor could do himself before the execution of these presents.'" Held:

"That the assignment is not, *per se* fraudulent and void."

These cases were decided in 1855, and counsel say they settle the main question in this case, that a debtor in this state has a right to make a deed of trust for the purpose of providing for the payment of all his creditors, and that a deed so made must stand until it is set aside on the ground of fraud.

On the other hand, counsel for the insurance company say that these cases are not good law at the present time; that in view of the legislation in Ohio, on the subject of assignments by insolvent debtors for the benefit of their creditors, since these cases were decided, they have been deprived of the importance they once had in the jurisprudence of this state. We are indebted to the brief of Judge Saylor, for a history of the legislation in this state, on the subject of insolvent debtors, from which we read, as we think it is both interesting and instructive.

"Under the constitution of 1802, and at the time when there was no probate court existing in Ohio, the legislature passed laws directing the mode of proceeding in chancery. One of the early acts thus passed was the act of February 23, 1835, found in 1 Curwen's Revised Statute of Ohio, p. 161.

Also found in note in 1 Swan & Critchfield, 712, under the head of "Former laws and decisions." The act provided:

"That all assignments of property hereafter made by debtors to trustees in consideration (contemplation) of insolvency and with design to secure one class of creditors and defraud others, shall be held to inure to the benefit of all the creditors of the assignor, in proportion to their demands, and such trust shall be subject to the control of chancery as in other cases, and the court, if need be, may require security of the trustees

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for the faithful execution of the trusts, or remove them and take the execution thereof upon itself as justice may require."

Under this section the common pleas court on the chancery side thereof had justification of such assignments made in contemplation of insolvency with design to secure one class of creditors and defraud others. That act was supplanted in 1838 by sec. 3, found in 1 Curwen's Statutes, p. 424, and is also found in 1 Swan & Critchfield in a note, page 712; and is as follows:

"All assignments of property in trust, which shall be made by debtors to trustees in contemplation of insolvency, with the design to prefer one or more creditors to the exclusion of others, shall be held to inure to the benefit of all the creditors in proportion to the irrelative demands; and such trust shall be subject to the control of chancery, as in other cases and the court, if need be, may require security of the trustees for the faithful execution of the trusts, or remove them and appoint others, as justice may require."

That section relates to assignments in fraud of creditors, and made with intent to prefer one or more creditors to the exclusion of others, and the chancery court had jurisdiction.

The sections above quoted, are substantially preserved in the present insolvent debtors act under secs. 6343 and 6344. At that time secs. 6335 and 6336, and the following sections down to sec. 6343, did not exist in Ohio, nor was there any other act relating to insolvent debtors which referred at all to the matters contained in secs. 6335 to 6343.

There was no probate court at that time, under that name. All of the present probate business was taken care of by the common pleas courts. At that time, therefore, all trustees under deeds of trust for the benefit of creditors, when it became necessary to seek action by the courts, were required by the chancery acts and practice to go into a court of chancery and obtain relief, and persons seeking to set aside fraudulent conveyances were required to go into a court of chancery under the acts above referred to, for relief.

In 1851 we adopted the new constitution of Ohio. In this new constitution, under article 4, sec. 7, the probate court is established and organized, and under sec. 8 the jurisdiction of the probate court is prescribed, giving it jurisdiction in probate and testamentary matters, the appointment of administrators, and guardians, the settlement of accounts of executors, etc., and such other jurisdiction, in any county as may be provided by law. That section does not give jurisdiction to the probate court over assignments for the benefit of creditors under the Insolvent Debtors' Acts.

After the adoption of that constitution of 1851, the legislature passed an act, to-wit: on March 14, 1853, found in Swan's Revised Statutes, 468; Curwen's Statutes at large, p. 2239; and also in the note, in 1 Swan & Critchfield, p. 712, which is as follows:

"Section XVI. That all assignments of property in trust, which shall be made by debtors to trustees, in contemplation of insolvency, with the design to prefer one or more creditors, to the exclusion of others, shall be held to inure to the benefit of all the creditors, in proportion to their respective demands; and such trusts shall be subject to the control of the courts, which may require security of the trustees for the faithful execution of the trust, or remove them and appoint others, as justice may require.

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This section was the only section at that date, to-wit: 1853, in force in Ohio relating to insolvent debtors, except the statutes wherein commissioners were appointed for the relief of imprisoned debtors. This act of 1853 is the same as the act of 1838, and the act of 1835, above referred to, both of which are contained in 1 Swan & Critchfield, 712.

This last act of 1853, however, drops out the reference to the court of chancery, and places the jurisdiction "subject to the control of the courts." At that time, in 1853, the common pleas court took jurisdiction under that section of the act.

It was not until April, 1859, that laws including the present insolvent debtors' law of Ohio, were passed. On April 6, 1859, the legislature passed the first general act regulating the mode of administering assignments in trust for the benefit of creditors, which is found in vol. 56 of the Statutes, 231, also 4 Curwen's Statutes at large, 352, and being the same law found in 1 Swan & Critchfield, p. 709, etc., except that sec. 1 of the act of 1859 was amended and added to in 1860.

In that act of 1859, under sec. 1, which is in almost every respect copied in sec. 6335, Rev. Stat., under the title of "Insolvent Debtors," it is provided, in substance, that whenever an assignment shall have been made to trustees of property for the benefit of creditors, it shall be the duty of the trustees within ten days to appear before the probate judge of the county, produce the original assignment, or a copy thereof, and cause the same to be filed in the probate court and enter into bond, etc.

Section 2 of the act of 1859 is almost identical with sec. 6336, Rev. Stat., under title of "Insolvent Debtors," and provides that if the assignees do not, within the ten days, comply with the provisions of the first section, by filing the deed of assignment and giving bond, on application of the assignor, or any creditor, the probate judge shall remove the assignees and appoint a trustee in their place.

Thus we learn that in 1859 the jurisdiction over insolvent debtors, and assignments for the benefit of creditors, was first placed in the probate court. Prior to that time all such deeds and conveyances came within the jurisdiction of the chancery side of the common pleas court, but under the act of 1859 the entire jurisdiction was removed from the common pleas court and placed in the probate court.

All decisions, therefore, which were made prior to 1859, do not fall within the present assignment laws of Ohio, and the cases cited by counsel for plaintiffs in error having been decided in 1855, can not be considered to have been made with a view to our present insolvent debtors' statutes.

Curwen, in his fourth volume of the statutes of Ohio, in a note to page 3352, cites a number of decisions, including *Hoffman v. Markall*, 5 O. S., 124, and says that, "None of these cases arose upon construction of this chapter."

There can be no question that the act governing voluntary assignments, commencing with sec. 5335, is a special act made especially applicable to assignments for the benefit of creditors, and being a special act making special provisions for deeds of assignment to be controlled by the probate court, it becomes exclusive and deprives all other courts of jurisdiction of such deeds. This is fully sustained by the authorities.

In *Betz v. Snyder*, 48 O. S., 503-4, the court say, "The whole subject of assignments by insolvent debtors for the benefit of their creditors, is specially provided for and regulated, in detail, by chapter 4 of title 2,

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of the Revised Statutes. By the first section of that chapter (sec. 6335), it is made the duty of every assignee, within ten days after the delivery of the deed of assignment to him, to cause it to be filed in the probate court of the county in which the assignor resided at the time of its execution; and it enacts that every "such assignment shall take effect only from the time of its delivery to the probate judge." "Upon the filing of the assignment, the assignee is required to enter into a bond for the faithful preformance of his duties; and from that time, the administration of the assignment became a pending proceeding in the probate court, and so continued until the trust is fully executed." "The probate court is invested with complete jurisdiction of the whole subject-matter of assignments, and of its administration to final completion."

In *McNeil v. Hagerty et al.* 51 O. S., 255, the court say on page 262, "Our statutes, sec. 6335 to 6338, place the disposition of insolvent estates within the control of the probate court, and direct the duties of the assignee, and the procedure in the administration of the trust."

To the same effect are *Lindeman v. Ingham*, 36 O. S., 1; *Blandy v. Benedict*, 42 O. S., 295; *Kemper v. Campbell*, 44 O. S., 210; *Sayler v. Simpson*, 45 O. S., 141; *Clays v. Banking Co.*, 50 O. S., 528; *Havens v. Horton*, 53 O. S., 342; *Wilson, Assignee, v. Swigart*, 1 Ohio Dec., 418.

Counsel for plaintiff in error draws a distinction between trustees and assignees. But an assignee is a trustee in every case. A trustee is one to whom property is committed in trust whether for some specific use or for the benefit of general creditors.

A trustee is also an assignee when the property held in trust by him has been assigned to him. The plaintiffs in error in this case were, before their removal by the probate court, both trustees and assignees—trustees for the general creditors of John W. Jones, of the property assigned to them by him.

A deed of assignment in the ordinary form, conveys a trust estate to the assignee, and it is his duty under the statute to file the deed in the office of the probate court of the proper county, within ten days, give a sufficient bond, and proceed to administer the trust. After paying the debts of the assignor and costs of administration, the residue is paid to the assignor. That was what was intended by the deed from John W. Jones to the plaintiffs in error. Nothing more, nothing less. Why, then, was it not a deed of assignment within the purview of sections 6335 and 6336?

We think it was, and that the fact that it was not drawn in the form in which deeds of assignment are usually drawn, and the further fact that the assignees are called "trustees" and the stipulations in the deed, as to the disposition of the property and the distribution of the proceeds arising therefrom, including the payment to the trustees of a reasonable compensation for their services, which are only the provisions of the law in matters of assignment, will not operate to change the character of the instrument.

The contention of counsel for plaintiff in error that as nothing appears on the face of the deed in question to show that John W. Jones was insolvent at the time of the conveyance, we can not presume he was insolvent, and, therefore, the trustees took a good title to the property conveyed for the purposes stipulated in the deed, we think is unsound.

The deed purports to convey all the property of John W. Jones, for the benefit of his creditors, and we think that fact alone carries with it the presumption that he was unable to pay his debts; that he was insol-

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vent and, like all assignors for the benefit of their creditors, made the conveyance to relieve himself from the pressing demands of his creditors, and to discharge his obligations, so far as his property would do so.

To hold such a deed to be in effect, anything else than an ordinary deed of assignment, would deprive the probate court of its jurisdiction in matters of assignment for the benefit of creditors. Any insolvent debtor could convey all his property to a trustee for the benefit of his creditors; the trustee would take the property, and the probate court would have no jurisdiction over him, or the estate in its administration. Thus, the statutes which, we have seen, confer especial and exclusive jurisdiction in all matters of assignment for the benefit of creditors on the probate court, would be evaded and rendered inoperative, and the probate court ousted of a part of its jurisdiction.

Entertaining these views as we do, we think they dispose of all the questions arising on the petition in error and record, and the only remaining question is the one made by the motion to strike from the files the petition in error and bill of exceptions on the ground of want of jurisdiction of this court.

It is contended by counsel for defendant in error that the order removing the plaintiffs in error, was not a final order from which error can be prosecuted.

Section 6707, Rev. Stat., provides that, "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title."

Error lies only from final judgments, decrees or orders, the determination of which affects a substantial right. *Kusley v. State*, 3 O. S., 508; *Watson v. Sullivan*, 5 O. S., 42; *Halbrock v. Connelly*, 6 O. S., 199; *Hobbs v. Beckwith*, 6 O. S., 252; *Steubenville v. Patrick*, 7 O. S., 170.

In *Brigel v. Starbuck*, 34 O. S., 280, it was held that an order removing an assignee was not appealable. On page 287, the court say, "an examination of our legislation and decisions shows that it has been the general policy in this state, not to permit an appeal from an order appointing or removing a trustee, and that this extends to guardians. * * * In view thereof, of the nature of an appeal, and not of the effect of allowing it in cases like the present, it seems to us that it was not intended to apply to such cases—that an order or decision to be subject of appeal must be definite or final in its character, and that it may be stated as a general rule, that an order to be appealable must affect property rights and not merely the administration of the trust. We do not think the original assignees has such interest in the trust as to enable them to litigate the question of their displacement by an appeal to the court of common pleas, nor do we think any creditor could litigate the question in that form."

We think, for the same reasons, that the assignee can not prosecute error. He has no substantial personal or property right to be affected by his removal. He has no interest in the administration of the estate except to perform his duties according to law and the order of the court. He is entitled to nothing but compensation for his services and remuneration for expenses paid out by him; and when no services have been

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rendered, and no expenses incurred, how can it be said that he has any right affected by his removal.

The interest of the creditors in the payment of their claims, and of the assignor in discharging his debts, are paramount to everything else in the administration of the estate, and to permit an assignee removed, to litigate the question of his removal, and thereby to hinder, embarrass, and delay the administration of the estate, would be to thwart the purpose of the law which is to adjust the rights of the creditors of the assignee with all reasonable dispatch.

For the reasons assigned, we think the motion to strike the petition in error and bill of exceptions from the files should be sustained, and the petition and bill dismissed.

The conclusion we have reached on the motion would have made it unnecessary for us to consider the case on its merits, but at the request of counsel we have done so, and our conclusion is, that there is no error shown by the record in this case.

John A. Cone and T. E. Powell, on behalf of Trustees removed.

J. D. VanDeman, Wolford & Crisinger and Sayler & Sayler, on behalf of J. D. VanDeman.

CONSTITUTIONAL LAW—STREET ASSESSMENTS.

[Hamilton Common Pleas.]

CHARLES ANDREW V. AUDITOR (HAMILTON CO.).

COBB, TRUSTEE, v. AUDITOR.

McFARLAN V. AUDITOR.

1. The act of the general assembly, entitled, "An act to authorize the commissioners of Hamilton county, Ohio, to improve Michigan and Shaw avenues, in sec. 27, Columbia township," passed April 13, 1893, (90 O. L., 224), is unconstitutional.
2. The provision in this act which provides "that a petition of the owners of a majority of the feet front of the lots and lands abutting on said avenues shall first be filed with the commissioners of said county, requesting the improvement of the same"; such petition becomes absolute, and must be held to speak as of the date when the commissioners first assumed jurisdiction on them, and acted in the matter, and must be measured as of that date as to the number of front feet signed to such petition.
3. *Quære*, as to whether the word "filed" as used in this act, signifies an act of the petitioners, of the county commissioners, or a mutual act of both. It is probably fairer to the county to give the word the signification of an act, performed by the petitioners.
4. The signature of the firm name, signed by a surviving partner to a petition for a street improvement, of property owned by such partnership and abutting on such proposed improvement, can not be counted as more than the signature of such surviving partner and will only represent his *pro rata* portion of foot frontage.
5. Where an owner of corner lots unites with others in a petition for the improvement of a street, states therein the number of feet his property abuts on such street, he becomes bound for the full number of feet fronting on such street and represented by the figures appended to his signatures, and such owner is estopped to avail himself of the decision in the Haviland case. Such estoppel, however, does not apply to the other petitioners. As to them the corner lots must be considered with reference to their actual frontage, determined as per the Haviland case, instead of their abutting length on the proposed improvement.

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6. The meaning of the words "to dispose of", as used in a declaration of trust, must be determined from themselves, from their context, and by application to the subject-matter.
7. Where the trustees of certain property sign a petition, as trustees, for the improvement of a certain street on which such property abuts, each of such trustees, to the extent of their individual interests in the property represented by such signatures are estopped to deny such signatures, but they are not estopped to deny that the commissioners ever obtained the requisite majority, or to set up any irregularities in the proceedings by the commissioners.
8. Before acts of an agent, which by estoppel, are to be construed as fastening a lien for assessment upon certain property, the agency to perform such acts must be clearly shown by those who seek to avail themselves of the estoppel.

JELKE, J.

I am of opinion that the act of the general assembly of the state of Ohio, entitled, "An act to authorize the commissioners of Hamilton county, Ohio, to improve Michigan and Shaw avenues, in section 27 Columbia township," passed April 13, 1893, 90 O. L., 224, is unconstitutional. *State ex rel. v. Commissioners*, 54 O. S., 333; *Grove v. Leidy*, 6 Ohio Circ. Dec., 116, which case was affirmed by the Supreme Court, 53 O. S., 662; *Hixon v. Burson*, 54 O. S., 470 and 483.

2. I find that neither Charles Andrew and others, heirs of Peter Andrew, deceased, William E. Galloway, Henry Gunkel, Frederick Danner, John S. Youtsey, Laura B. McFarlan, nor the ancestors in title of any of them, signed the petition to the county commissioners, and I do not find anything in the testimony estopping them from availing themselves of the unconstitutionality of the law, *supra*. *Columbus v. Agler*, 44 O. S., 486.

3. It is important to determine from the law and the evidence the time from which the petition speaks. Certain testimony was offered as tending to show that the petition was filed with the commissioners on May 13, 1893. The first mention of the petition on the commissioners minutes is on June 28, when action was taken ordering the improvement.

Between May 13, and June 28, 1893, the following pieces of property changed hands:

MICHIGAN AVENUE.

May 22, Laura S. French to E. J. Tully, 50 feet.

May 25, Laura S. French to Amelia Mark, 50 feet.

SHAW AVENUE.

May 27, James E. Mooney to Chris. Stichtenoth, 50 feet.

May 29, James E. Mooney to Chris. Stichtenoth, 50 feet.

May 22, Laura S. French to Mary Murphy, 50 feet.

May 22, Laura S. French to Ellen Murphy, 50 feet.

In all these conveyances, the grantors were petitioning property owners on May 13. Hence, the difference of the petition speaking as of May 13 or June 28, is, as to Michigan avenue, whether 100 feet should go into the petitioning or non-petitioning column of property owners, and as to Shaw avenue, whether 200 feet should go into the petitioning or non-petitioning column of property owners.

The importance of this question is seen when it is noted, that even if either of the contentions of the plaintiff's counsel as to the Knorr property

or as to the corner lots were determined in favor of the plaintiffs, yet the deficiency would be overcome and a majority remain if these petitions are to speak as of May 13.

The act provides, "that a petition of the owners of a majority of the feet front of the lots and lands abutting on said avenues shall first be filed with the commissioners of said county, requesting the improvement of the same."

Some doubt is connected with the use of the word "filed," whether it signifies an act of the petitioners, of the county commissioners, or a mutual act of both. The Standard dictionary defines the word: "File, V. * * Law (1) To deposit, as a paper or document in a court or public office. (2) To indorse the fact and date of filing of such paper or document."

There is certainly no evidence of any act by the board of county commissioners as such, acknowledging the receipt or recognizing in any way this petition as of date, May 13, 1893.

It is probably fairer to the county to give the word the signification of an act, performed by the petitioners, as the word "presented," is used in 1634 and 1644, Rev. Stat., and admit, for the purpose of the argument that the petitions were presented or deposited or filed by the petitioners on said May 13, 1893.

In *Dutton v. Hanover*, 42 O. S., 215, per Johnson, C. J., in proceedings under sec. 1647, Rev. Stat., it was held:

"Upon presentation of a petition to council for such an election it is the duty of the council, before taking action thereon, to satisfy itself that it contains the requisite number of qualified petitioners, and for that purpose may refer the same to a committee to make the necessary examination."

"While such petition is under consideration and before action thereon by the council, signers thereof may withdraw their names from such petition, and if thereby the number of names is reduced below the requisite number, it is the duty of the council to refuse to order such election."

From this it is evident that a petition did not become absolute by being presented to council, but was subject to change and the withdrawal of names, and that the burden was upon council to be assured of the majority required by statute at the moment that it took any action based upon such petition.

The court in *Dutton v. Hanover*, *supra*, cites *Hays v. Jones*, 27 O. S., 218, and *Grinnell v. Adams*, 34 O. S., 44, as respectively showing the right and effect of such changes or withdrawals before and after jurisdiction has been assumed by the board by taking some action on the petition. The court per Ashburn, J., in *Hays v. Jones*, *supra* said:

"The jurisdiction of the board of county commissioners to make the final order for the improvement, under these statutes, is special, and conditioned upon the consent, at the time the final order is to be made, of a majority of the resident land-holders, who are to be charged with the cost of the improvement."

"Resident land-holders, who have subscribed a petition praying for such road improvement, may, at any time before such improvement is finally ordered to be made by the board of county commissioners, withdraw their assent by remonstrance, or having their names stricken from the petition, and after withdrawal of consent, such person can no longer be counted as petitioning for the improvement."

In *Grinnell v. Adams, supra*, the court said: “* * * After jurisdiction is thus conferred and assumed by the commissioners it is their power to proceed defeated by all or any number of such petitioners subsequently remonstrating against the prayer of the petition being granted? We are unanimous that this question must be answered in the negative.”

True, the court went on to say: “In so holding, we do not undertake to overrule *Hays v. Jones, supra*. That case involved the construction of a statute materially different from the act of 1853, “but the Supreme Court in *Dutton v. Hanover, supra*, made exactly the same use of these two cases, which I do in the case at bar in fixing the time when a petition becomes absolute, viz: When the petitioned board assumes jurisdiction by acting upon it.

In the matter of *Sharp, 56 N. Y., 257*: “A petition had been presented to said board and signed by the owners of property fronting on said street, but not a majority as required by the act of 1870. Held: That a signer of said petition was not estopped thereby from questioning the authority of the board and moving to set aside the assessment; that he had a right to rely upon a performance of its duty by the board, which required it, before basing any action on the petition, to ascertain whether a sufficient number had signed to confer jurisdiction.”

And our Supreme Court in *Tone v. Columbus, 39 O. S., 33*, said: “We think this is a correct statement of the law. Upon principal there is no basis for the estoppel thus claimed. The owner signed the petition for the privileges of the act, for the improvement of the street. He did not thereby represent to the city that his name made the requisite two-thirds; nor waive the legal requirement that upon the presentation of the petition, the city, before basing any action upon it, would ascertain whether the legally required number had signed, and refuse to order the improvement if they had not.

“We conclude, therefore, upon principle and authority, that the plaintiff in error is not estopped by the mere fact that he signed the petition, from asserting that the city did not obtain jurisdiction to order the improvement, because two-thirds of the owners had not petitioned.”

The act of the legislature involved in *Tone v. Columbus, supra*, is contained in 72 O. L., 153, sec. 24 of which provides: “The city council of any such city shall not have the right to authorize any improvement under this act unless the owners of two-thirds of the feet front of the property abutting upon any street or avenue to be improved in said city shall petition the city council for the privileges of this act.”

After the Supreme Court had rendered its decision in *Tone v. Columbus, supra*, this case again came up for the application of the principles therein laid down to certain states of facts, and the circuit court, *Williams, Cox and Shauck, JJ., 1 Ohio Circ. Dec., 168*, said:

“Other questions arise out of the evidence showing that according to the deed record, some of the petitioners conveyed away their property after signing the petition, but before the passage of the ordinance, and that others did not become owners of abutting property until after the passage of the ordinance. The act contemplated a petition signed by those who were owners of the property at the time of the passage of the ordinance. In view of the rule exempting the plaintiffs from offering plenary evidence, they were relieved of the burden incumbent on them when they showed from the public record that the petitioners in this class were not then the owners of abutting property. It then became the duty of the defendants, who asserted ownership contrary to the record to establish it.”

Further, it is in evidence in the case at bar, as it was in the case of *Gibson v. City*, 6 Ohio Circ. Dec., 422, that the commissioners did not rely on any representation made by the singners as to their ownership or frontage, but had a full examination made as to all of these matters by their engineer or solicitor, and relied on the report made by him.

Approaching this question from a different point, that is, the condition of the law and not the condition of the petition, Judge Sayler, in superior court general term, in *Shehan v. City*, 11 Ohio Dec. Re., 198, said:

"The law in force at the time of the passage of the improvement ordinance, governs with respect to the manner of assessment, and the rights and liabilities of the owners of abutting property, *Cincinnati v. Seasongood*, 46 O. S., 296; this rule is not affected by the fact that the owners of the abutting property petitioned for the improvement."

"The question of the rights of the property owner under a petition to improve was considered by Judge Maxwell in a very able opinion in the case of *Black v. City*, decided in October, 1887, and he held that the petition was in the nature of a request, and an agreement that if the city would do certain things, they, in turn would undertake to pay for the improvement in whole or in part, and that this proposition of the property owner was accepted on the part of the city by the passage of the ordinance to improve, and that at that point in the proceedings the property owner acquired vested rights." Also, see: *Douglass v. City*, 29 O. S., 165, and *Cincinnati v. Seasongood*, 46 O. S., 305.

In the case of *Squier v. City*, 3 Ohio Circ. Dec., 196, the circuit court of this county seems to differ from the *Shehan* case and depart from the *Seasongood* case, but construes the law as in effect on a certain day because the petitions had been filed and acted upon by the board on that day and this initiated a proceeding. See 2nd syllabus, p. 400.

From an examination of these cases, I am of opinion that the petition in the cases at bar became absolute, and must be held to speak as of the date when the board of county commissioners first assumed jurisdiction on them, and acted in the matter, which was June 28, 1893, and must be measured as of that date as to the number of front feet signed to them. I am further of the opinion that the burden was upon the board of county commissioners to determine whether or not the names of the owners at that time of a majority of the feet front were signed to the petitions, for the purpose of assuming jurisdiction.

"Nor is there anything in the act that implies that they are authorized to determine conclusively by their own action that the pre-requisite consent has been obtained, upon which they have the power to act. They can not thus defeat the rights secured by law to the owners of property on a street proposed to be occupied by a street railroad."

Roberts v. Easton, 19 O. S., 86.

I am glad to be able to determine this question as a matter of law as I would not like to have this case turn upon anything so unsatisfactory as the evidence was upon this point. However, my conclusion on the law is in accord with my impression as to the fact.

Omitting that part of Shaw avenue lying south of Erie avenue, and not in the improvement contemplated, and deducting this frontage from the number of feet signed for by James E. Mooney, trustee, I find the petitioning and non-petitioning property on June 28, 1893, as follows:

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MICHIGAN AVENUE.

Petitioning:

James E. Mooney, Tr.	454.56.
F. B. Oyer,	200.
O. B. Cobb, Tr.	300.
Laura S. French,	300.
Thomas French, Jr.,	300.
A. & H. Knorr,	300.

1854.56.

Non-petitioning:

Henry Gunkel,	100.
T. S. Youtsey,	200.
A. G. Thomas,	100.
Henry Westons,	100.
Peter Andrew,	721.91.
R. Reinboldt,	222.05.
W. H. Carter,	100.
J. F. Merrill,	100.
E. J. Tully,	50.
Amelia Mark,	50.

1743.96.

Signed	1854.56.
Not Signed	1743.96.
Majority	110.60.

SHAW AVENUE.

Petitioning:

Thomas French, Jr.,	300.
C. B. Russell,	300.
A. & H. Knorr,	300.
J. E. Mooney, Tr.,	505.68.
James Ross,	100.
Jennie S. Cresap,	190.60.
Mary E. Reynolds,	200.

1896.28.

Non-petitioning:

Peter Andrew,	1270.75.
Ellen Murphy,	50.
Mary Murphy,	50.
Christopher Stichtenoth,	100.
J. H. Feldman,	100.
W. E. Galloway,	100.
B. Frenkel,	100.
C. P. & V. R. R.,	30.

1800.75.

Signed	1896.28.
Not Signed	1800.75.
Majority	95.55.

4. This brings us to the consideration of three questions which affect the signatures on both Shaw and Michigan avenues, and the number of front feet represented by such signatures. First, as to the Knorr property, and second, as to the number of front feet to be considered as signing with regard to corner lots under the Haviland case, and third, as to the signature of James E. Mooney, trustee. In addition to these, we have the question of the signature of Orris P. Cobb, trustee, which applies to 300 feet on Michigan avenue only.

It will be seen that if any one of the first three questions above be resolved in favor of the property owners, the petition must fail.

As to the signature of A. & H. Knorr, of all the points in the case, upon this point I am clearest. I am satisfied, and am of opinion that this signature can not be counted as more than the signature of Adam Knorr, and for more than 150 feet, and I feel that the benefit of the doubt is given to the county when this signature is allowed to stand for the 150 feet of Adam Knorr: By the death of Henry Knorr, the partnership was *ipso facto* dissolved, and the testimony showed there were no partnership debts.

Our Supreme Court held in *Rammelsberg v. Mitchell*, 29 O. S., 23, 7 syllabus: "But real estate not needed or used for the partnership purposes, though paid for with partnership means, is not assets of the firm within the meaning of this act, notwithstanding the rents and profits thereof be applied to partnership uses." Likewise see *Galbreath v. Gedge*, 16 B. Monroe, 631.

As to the claim that Adam Knorr acted as agent, this certainly could not be as to the four minors, and as to the three boys who were of age, in the language of the case of *Tone v. Columbus*, *supra*, it is "idle to inquire whether such authority was given since it is apparent that it was never exercised." The signature is neither that of the agent nor of the principals. The "& H. Knorr" stood for the seven heirs, or for nobody. It could not stand for the seven heirs, so it stands for nobody. As Adam Knorr's interest was an undivided one-half, and the other one-half was not obtained, I am extremely doubtful whether any part of this 300 feet should be counted, but on this point I give the benefit to the county.

I am, therefore of opinion that as to the signature of A. & H. Knorr, 150 feet will have to be deducted from the petitioning column and added to the non-petitioning column in the foregoing schedule.

5. As to the corner lots, all of which are represented by the signature of James E. Mooney, trustee, assuming for the purpose of this point, for the time being, that the signature of Mooney is valid and sufficient, I am of opinion that James E. Mooney, trustee, is bound for the full number of feet fronting on these avenues, and represented by the figures appended to his signatures, and can not now avail himself of the decision in the Haviland case.

In *Cincinnati v. Manss*, 54 O. S., 257, the Supreme Court held, per Mitchell, J. "Where an owner of property on a street unites with others in a petition for its improvement, stating therein the number of feet his property abuts on the street, that the council may be informed as to the interests of the petitioners, he thereby represents to council that he has the number of assessable feet stated in the petition; and after the improvement has been ordered, and the work done, he is estopped to say that he has a less number of feet subject to assessment.

And on page 264, further says: "There is nothing in *Tone v. Columbus*, *supra*, in conflict with what is here held. It was there held that *Tone*, by having signed the petition for the improvement, was not estopped from averring and proving that the petition had never been signed by the requisite two-thirds in interest required by the statute under which the proceeding was had; but that is not this case. *Manss* claims that he signed the assessable number of feet represented in the petition for the improvement, which petition was signed by himself, a very different question from that in the case of *Tone*."

Such estoppel, however, does not apply to the other petitioners. As to them the corner lots must be considered with reference to their actual frontage on *Eric avenue*, determining the frontage as per the *Haviland* case, instead of their abutting length on *Michigan* and *Shaw avenues*. Hence the total frontages would be decreased by the amount which the abutting length exceeds the actual frontage, and would be as follows:

Michigan avenue actual frontage, 3598.52.

Deduct for corner lots, N. W. Cor., 125.76.

N. E. Cor., 102.50.—228.36.

Total frontage, 3370.16.

One-half to total frontage, 1685.08.

Mr. *Mooney* signed for all the corner lots so that the deduction must be made from the total number of feet apparently signed.

Number of feet signed on *Michigan avenue*, 1854.56.

Deduct for corner lots as above, 1228.36.—1626.20.

Necessary for majority as above, 1685.08.

Deficiency, 58.88.

Shaw avenue actual frontage, 5697.05.

Deduct for corner lots, N. W. Cor., 51.53.

N. E. Cor., 104.16.—155.48.

Total frontage, 5541.55.

One-half of total frontage, 1770.775.

Here again both the corners were signed for by Mr. *Mooney*, so that both are apparently petitioning:

Number of feet signed on *Shaw avenue*, 1896.28.

Deduct for corner lots as above, 155.48.—1740.80.

Necessary for majority as above, 1770.775.

Deficiency, 29.975.

I am therefore of opinion that so far as this case is affected by the corner lot question, the petitions as to all the plaintiffs, both petitioning and non-petitioning, excepting *James E. Mooney*, trustee, are deficient, as to *Michigan avenue* in the amount of 58.88 feet; as to *Shaw avenue* in the amount of 29.975 feet.

6. This brings me to a consideration of the sufficiency of the signature of *James E. Mooney*, trustee. Having found, as I have, in regard to the *A. & H. Knorr* signature, and as to the date from which the petitions speak, it is perhaps unnecessary for me to pass upon the power of *James E. Mooney* to sign these petitions, under the declaration of trust, but I give the matter consideration for two reasons; first, because this question was ably argued and presented by counsel; and second, because if, this question should be resolved in favor of plaintiffs, even though I should be wrong in my conclusion as to the date from which the petitions speak, and they should be held to speak as of May 13, 1893, and for the number of feet at that time owned by the signers, the petitions would still fail.

James E. Mooney, trustee, held the title to 454.56 feet on Michigan avenue, and 505.68 feet on Shaw avenue.

The terms of the trust and the duties and powers of the trustees are set forth in the declaration of trust as follows: "Now, therefore, we, Albert S. Berry, Charles H. Kilgour, John Kilgour, James E. Mooney, Thomas B. Youtsey and John Zumstein, have made, constituted and appointed, and by these presents do make, constitute and appoint, James E. Mooney, trustee, our true and lawful attorney, for ourselves, and in our names, place and stead, to execute and deliver in his own name, as such trustee, any and all deeds, leases, contracts and other instruments by writing, that he may deem necessary, in order to dispose of any and all of the above described real estate, and so to do at such times, to such person or persons, and upon such terms as he may deem best, giving and granting unto our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intent and purposes as we might or could do if personally present, with full power of substitution and revocation, and giving unto the said James E. Mooney, trustee, full authority to appoint and substitute with all the powers, he, the said James E. Mooney, trustee, possesses under their said agreement, hereby rectifying and confirming all that our said attorney, or his substitute, shall lawfully do, or cause to be done by virtue hereof."

For the purpose of determining whether or not James E. Mooney, as such trustee, had power to sign these petitions, I will dismiss from consideration all oral testimony which may have been introduced, and look only to the instrument itself, and the subject-matter, this tract of land, sub-divided and platted as it was.

Tyler v. Granger, 48 Cal., 259. "When a conveyance is made to a person as a trustee, and he at the same time executes and delivers to the grantor a declaration in writing, in which there is no ambiguity, stating the objects and purposes of the trust, the powers and duties of the trustee, with reference to the trust estate, are to be ascertained from the deed and the declaration and when so ascertained, the rights and duties of the parties must be controlled thereby."

The discussion centers around the words, "to dispose of" to determine their scope and meaning: "To execute and deliver in his own name, as such trustee, any and all deeds, leases, contracts, and other instruments by writing, that he may deem necessary in order to dispose of any and all the above described real estate."

I recognize, in the beginning that the signing of such a petition is an exercise of the highest power which can be exercised over real estate. It is, in some respects greater than that of signing a deed of sale or conveyance, because a deed could only transfer subject to existing encumbrances, while a signature to such a petition might and would create a lien which would take precedence over existing encumbrances, and if not paid, ultimately forfeit the property to the state of Ohio.

Counsel for the syndicate and plaintiffs, construes and limits the words, "to dispose of" to a power to sell, and then proceeds to demonstrate that the signing of such a petition transcends a power to sell.

He cites Devlin on Deeds, 436-446a.

Chapter 17, secs. 431-455, of Devlin on Deeds, treats of the subject of "Deeds by trustees for sale." He also cites, Hoyt v. Jacques, 129 Mass., 286.

"A devise of so much of the testator's estate as may be sufficient for the maintenance of the devisee during his life," he having full power to sell and convey any and all of my real estate, at any time, if necessary, to secure such maintenance" does not give to the devisee the right to mortgage the estate in fee."

There is no doubt about these authorities and the proposition that if this instrument only gives to James E. Mooney power to sell "out and out," that the signing of such a petition would be beyond his power.

Vid. *Perry on Trusts*, chapter 25, secs. 764-768.

I am of opinion that counsel begs the question at the threshold, the words are not "to sell" but "to dispose of," and we have no right to so limit and restrict their meaning, but we must determine their meaning from themselves, from their context, and by application to the subject-matter. "To dispose of," is a far more generic expression than "to sell" and has been held to include a greater number, higher, lower and more varied acts than "to sell."

The *United States v. John P. Gratiot et al.*, *Peters' Reports S. Court U. S.*, 526, the syllabus is as follows: "The words 'dispose of,' public lands, used in the constitution of the United States, can not under the decisions of the Supreme Court receive any other construction than that congress has power, in its discretion to authorize the leasing of lead mines on the public lands, in the territories of the United States. There can be no apprehensions of any encroachments upon state rights by the creation of a numerous tenantry within the borders of the states, for the adoption of such measure."

And the court also says, on page 537: "And the constitution of the United States (article four, section three), provides: That congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The term, territory, as here used, is merely descriptive of one kind of property; and it is equivalent to the word lands. And congress has the same power over it as over any other property belonging to the United States; and this power is vested in congress without limitation, and has been considered the foundation upon which the territorial governments rests. In *McColloch v. State of Maryland*, 4 *Wheat.*, 422, the Chief Justice in giving the opinion of the court, speaking of this article, and the powers of congress growing out of it, applies it to territorial governments; and says, all admit their constitutionality. And again, in the case of the *American Insurance Company v. Canter*, 1 *Peters*, 542, in speaking of the cession of Florida under the treaty with Spain: He says, that Florida until she shall become a state, continues to be a territory of the United States government, by that clause in the constitution which empowers congress to make all needful rules and regulations respecting the territory or other property of the United States. If such are the powers of congress over the lands belonging to the United States, the words, "dispose of" can not receive the construction contended for at the bar; that they vest in congress only the power to sell, and not to lease such lands. The disposal must be left to the discretion of congress.

In *Rodgers v. Goodwin*, 2 *Mass.*, 476, the court says as follows: "By the law of the colony of Massachusetts, passed as early as the year 1636, (1) authority was given to the freemen of every town to dispose of their lands, etc. In the preamble to a statute passed in 1753 (1) it is recited that the proprietors of lands lying in common have power "to

manage, dispose and divide the same in such way and manner as hath been, or shall be concluded and agreed on by the major part of the interested."

Of these statutes a practical construction early and generally obtained that the power to dispose of lands was included power to sell and convey the common lands.

In *Lessee of Clark et al. v. Courtney et al.*, 5 Peters, 318, the syllabus is as follows: "A power of attorney to sell, dispose of, contract and bargain for land, etc., and to execute deeds, contracts and bargains for the sale of the same, did not authorize a relinquishment to the state of Kentucky of the land of the constituent, under the act of the legislature of that state of 1794: which allowed persons who held lands subject to taxes, to relinquish and disclaim their title thereto, by making an entry of the tract or the part thereof disclaimed, with the surveyor of the county."

The court further states on page 346: "Another objection is, that the power of attorney produced, even if duly executed, does not justify the relinquishment. It purports to authorize Carey L. Clark," to sell, dispose of, contract and bargain for all or so much of said tract of land, etc., and to such person or persons, and at such time or times, as he shall think proper; and in our or one of our names, to enter into, acknowledge and execute all such deeds, contracts and bargains for the sale of the same as he shall think proper; provided always that all deeds for the land are to be without covenants of warranty or covenants warranting the title to the land from the patentee, and his assigns, etc.

And also on page 348, the court says: In point of fact then, the relinquishment gives them nothing as a compensation for the land; but restores back again only the money (if any) which they have paid. Can such a relinquishment for the purposes contemplated by the statute, be in just sense deemed a sale? We think not. It is a mere abandonment of the title; or, in the language of the act, a relinquishment or disclaimer. The letter of attorney manifestly contemplated the ordinary contracts of bargain and sale between private persons, for a valuable consideration, and conveyance by deed without covenants of warranty. The very reference to covenants, shows that the parties had in view the common course of conveyances, in which covenants of title are usually inserted, and the clause excludes them. The statute does not contemplate any deed or conveyance, but a mere entry of relinquishment or disclaimer of record.

In *Platt v. Union Pacific Railroad Co.*, 99 U. S., 48, the syllabus is as follows: That the words "or disposed of" are not redundant, nor are they synonymous with "sold," but they contemplate a use of the lands granted different from the sale of them, and that a mortgage of them, is such a use.

Also on page 60, the court says: "Congress must have been blind indeed, if it did not foresee this, and intend to authorize the use of the lands to raise money by mortgage for the object it had so much at heart. This, we think, was what was intended by the phrase "or dispose of," as distinguished from sold. Some of the lands might be sold as the work was progressing, and others could be used in aid of the construction only by pledging them to persons who might be willing to advance money on the faith of their prospective value. But whether sold or used as a security for money loaned to advance the construction of the road, they were equally employed for the purpose for which they were granted.

The words, "dispose of" are undeniably apt words to indicate a transfer by mortgage.

Also in *Beard v. Know*, 5 Cal., 256, the court say: "The statute of this state defining the right of husband and wife, passed April 17, 1850, provides that 'all property acquired by either husband or wife, except such as may be acquired by gift, bequest, devise or descent, shall be common property.'" It is further provided, that the husband shall have the entire control of the common property, with absolute power to dispose of it, and upon the dissolution of the community by death of either the husband or wife, one-half of the common property shall go to the survivor, etc.

The words, "with absolute power to dispose of," ought not to be extended to a disposition by devise. The husband and wife during coverture, are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is at present, definite and certain interest, which becomes absolute at his death, so that a disposition by devise, which can only attach after death of the testator, can not affect it, for such a conveyance can only operate after death, upon the very happening of which the law of this state determines the estate and the widow becomes seized of one-half of the property.

In *Sheffield v. Lord Orrery et al.*, 3 Atkyns' Reports, 286, the court say: "First, it has been objected that the eighth clause is co-extensive with the ninth, and consequently if the house is comprised in the ninth it must be in the eighth, for it is that all things comprised in the eighth clause are directed to be sold, and consequently the house pictures and statutes must be sold contrary to the Duke's manifest intent.

"This is clearly otherwise, for by the eighth clause the trustees are not directed to sell but to dispose of all his real and personal estate and therefore the word dispose does not import to sell, but to manage to the best advantage for the family; and the subsequent words, which direct to buy land are confined to money, and can not extend to the house, statutes or pictures. And the general direction to sell is constrained in the fourteenth clause."

In *Gordon v. Preston*, 1 Watts., 386, is the following: "By the second section of the act of incorporation the company was authorized to purchase in fee or for any less estate, all such lands, tenements and hereditaments, and estate real and personal, as shall be necessary and convenient for them in the prosecution of their works; and the same to sell and dispose of at their pleasure." According to the principle of *Lancaster v. Dolan*, 1 Rawle, 131, a power to sell includes a power to mortgage, even under the statute of uses, though strictly construed; and a *fortiori*, it ought under a statutory grant which is to be beneficially construed in furtherance of the object. But the super-added words, "dispose of" which would otherwise be redundant, leave no doubt of the existence of an intent to give the corporation power to part with its real estate by any voluntary act, without regard to the mode of its operation; and, as a power to encumber, might be necessary to the prosecution of its works, it is not to be doubted that it was intended to be given.

In *Fling v. Goodall*, 40, New Hampshire, 219, the court say: "But it is said that the terms used in describing the duties of the receiver in the two sections are different; that he is to 'collect,' in sec. 15, which it is said commonly refers to notes, and 'to dispose of' in sec. 16, which it is said, can only mean to sell, and must necessarily apply to

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other property than notes, bonds or promises to pay. But we presume that the receiver under section 15, would not only need to collect, but, in case of a bond or other promise for the delivery of property (other than money), provided for in that section, he would be obliged to sell such property before he could apply the proceeds as that section directs. Under the authority to collect in this section, the receiver is empowered to collect, sell and do whatever is necessary should be done, to convert the notes, bonds and other property referred to in that section in money, so that he might apply the same to the payment of the claim of the principal debtor. And the same would hold true of the authority conferred upon the receiver in section 16, by the use of the words, 'disposed of.' It would probably occur to any competent receiver that the best way to dispose of a good note, in order to realize the greatest amount of money upon it, would be to collect it, and the best way to dispose of cattle, horses and carriages, would be to sell them at auction; and we have no doubt that the terms used in each section are comprehensive enough to confer upon the receiver sufficient authority to do all that is necessary to be done in order to carry into full effect the provisions of these several sections, under such directions as the court are authorized to give him in each particular case."

In *State of Minnesota v. Duesting*, 33 Minn., 103, the court say: "The court instructed the jury, under defendant's exception, in substance, that if they should find that defendant was keeping a saloon, and was a dealer in or vendor of malt liquors within the limits of the city, the word 'dispose' as used in the ordinance, covered and forbade the furnishing and delivery, to the party named in the complaint, by the defendant, at that place, of malt liquors belonging to the defendant, whether he received any compensation therefor or not. In other words, within the intent and meaning of the ordinance, there might be, under such circumstances, an unlawful disposition by gift as well as by sale and barter."

From an examination of the foregoing, we find the words "to dispose of" have been variously construed at different times, under different circumstances, with different context and with reference to different subject matters, to mean, to sell, to mortgage, to lease, to govern, to manage, to collect and to give away.

The words "to sell" certainly have no such elasticity of meaning.

In New York it has been held that a power given to executors to sell, might, under certain circumstances, be held to include the power to dedicate certain streets.

In the matter of opening Sixty-seventh street, *Howard's Practice Reports*, p. 270, the court says as follows: "It is no doubt true that the legal appropriation or dedication of real estate for the purpose of streets or public places is required to be made by the sanction or authority of the owner of the fee. The principle is so well settled as to require no reference to the authorities for the purpose of sustaining it. But the executors in this case, under the will of the owner of the fee, were, in terms, empowered to dispose of it. It is not necessary to determine the point, discussed to some extent, whether the provisions contained in the will on this subject, was a trust or mere power, for in either case the effect of the language made use of would be the same. By that language the testator authorized such of his executors as should take upon themselves the execution of his will, or the survivor or survivors of them, for the purpose of dividing his estate, or otherwise, to sell all or any part of his real estate, not specifically devised, either at public or private sale for cash, or upon

credit, and upon such sale to execute the deeds necessary or proper to carry the sales into effect, and he then added, that the sales so to be made should be an effectual bar against the claim of any person or persons claiming under him. The portion of the testator's property through which the street in controversy was laid out, was not specifically devised by him, and for that reason it was comprehended within this power conferred by him upon his executors. The authority given to them to sell it was of a broad and unlimited character, allowing that to be done as their judgment might indicate it to be proper and advantageous to his estate. The property was valuable for the occupancy and use of persons desiring to improve it. It was situated in that part of the city where it was available to be built upon, and it could be sold for that purpose only by providing some means of access to it. If the lots had been conveyed without the advantages of a street in front of them, they would evidently have been of much less value than if that means of approach and enjoyment were provided; a proper sale of property of this description necessarily includes the power to provide some means of ingress and egress to and from it, and that in such a locality can be used as well by the owners as by all other persons passing in the vicinity."

"In no other way can the proper advantage of this nature of property be acquired or enjoyed by the purchaser. The object of the testator in creating this power of sale, was to secure as large a sum as might be obtained from his property, and a division of it among his devisees, and whatever was necessary to promote that end must be included within the power created by this provision of the will. The power properly to divide and lay it out in lots and streets, was a necessary incident of the power of disposition given by the testator to his executors. They might, it is true, have sold the property as a mass, but it is evident that if they had done so that the purchaser or purchasers would have been obliged to have opened the street in order to give them the full benefit and advantage of their purchases and for that reason so much less would have been derived from the sale of the property, as the land was considered worth, which would be required to be included within the limits of the street. The executors, in the exercise of their judgment, considered that not to be a favorable disposition of the property which they sold. They chose on the contrary to divide it up into lots bounded upon this street themselves, with the probable expectation that in pursuing that course more money would be derived from it than by a sale of it in any other manner. This was a subject which the testator had left to be determined by the judgment of his acting executors, and in what they did, they seem to have been warranted by the authority created by the will."

To the same effect is *Earle v. New Brunswick*, 38 New Jersey Law, p. 47. Also see *Wishy v. Boutt*, 19 O. S., 238.

Looking then, to the declaration of trust in the case at bar, evidently drawn by no unskilled hand, the parties seem to have eschewed words and expressions of limited and narrow meaning, and to have chosen rather, the larger and generic term "to dispose of." Looking again to the subject-matter of this trust, this platted sub-division and the purpose and object of the trust to market its lots, I am inclined to adopt the language and reasoning of the court in the matter of opening Sixty-seventh street, *supra*.

It was a devoting of a part of this property to the purpose for which it was granted.

Vid, *Platt v. Union Pacific R. R. Co.*, *supra*.

I am of opinion that when James E. Mooney signed these petitions he had the power to do so.

7. As to the signature of Orris P. Cobb, trustee, as there was no declaration of trust or anything in the deed conferring powers upon the trustee or defining his powers, I am of opinion that Orris P. Cobb as such trustee, had no power to sign the petition.

I find from the fact of signing, and from the evidence as to the authorization so to sign by Wallace Burch, that Orris P. Cobb and Wallace Burch, each of them, to the extent of their individual interests in the property represented by such signature are estopped to deny such signature, but they are not estopped to deny that the commissioners ever obtained the requisite majority, or to set up any irregularities in the proceedings by the commissioners.

8. I found above that on account of the A. & H. Knorr signature, both petitions in this case must fail as petitions. Hence, on the question of estoppel, the rights of all the plaintiffs herein, must be determined without reference to the petitions, as though there never had been an attempt to get up a petition. For the mere signing does not estop the plaintiffs from asserting the defect in the petitions.

Bottom of page 300, *Tone v. Columbus*, 39 O. S. Signing may be one of a number of acts, which taken together might work estoppel, but by itself it is not enough.

Bottom of page 300, *Tone v. Columbus*, 39 O. S. The rules then, as to estoppel by which the conduct of all the plaintiffs herein (excepting two whom I shall mention) is to be measured, are those laid down in the *Tone* case, as applicable to the so-called "silent ones."

Tone v. Columbus, 39 O. S., 303, of the opinion.

1. That he knew the improvement was being made.
 2. That it was intended to assess the cost thereof upon his property.
 3. That he knew of the infirmity or defect in the proceedings, under which the improvement was being made, which would render such assessment invalid, and which he is to be estopped from asserting.
 4. Some special benefit must have accrued to the owner's property, distinct from the benefits enjoyed by the citizens generally.
- It is the third of these requirements which is totally lacking in the proof introduced to establish an estoppel.

In fact, the irregularity in the proceedings of the county commissioners, to-wit: That they were proceeding on an insufficient petition will not be definitely known until I shall have so determined by announcing my decision in this case.

While such silent owners may be presumed to know of the invalidity of the statute, a presumption of knowledge does not exist with regard to the illegality of the proceedings of the public officers, which they have the right to assume are regular until they have knowledge to the contrary.

Tone v. Columbus, 1 Ohio Circ. Dec., 168, *Matter of Sharp*, 56 N. Y., 257, and *supra*.

9. I now come to the inquiry whether any of the plaintiffs in this case participated so actively in pushing these improvements as to be estopped from denying the validity of the proceedings, and the assessments made in pursuance thereof.

Bottom of page 300, *Tone v. Columbus*, 39 O. S.; *State ex rel. v. Mitchell*, 31 O. S., 592.

From the evidence I find that there are two, who have from beginning to end participated with great activity in pushing these improvements

Andrew v. Auditor.

and causing them to be made, Wallace Burch and Tilden R. French, and I am of opinion that they are estopped.

10. Another question is urged, whether such estoppel of Burch and French is confined to themselves or extends to those-whom they represented in various capacities of agency.

As I said above, signing such a petition is an exercise of the highest power over property. So I think that acts which by estoppel are to be construed as fastening a lien for assessment upon such property should be of the same high character. If such acts, which are to be so construed by estoppel, are performed by an agent, the agency to perform them must be clearly shown by those who seek to avail themselves of the estoppel.

The acts are of too great consequence, and the results too important to have the power to do them lightly attached to agencies of a general nature or for other purposes.

The agency might be in the first instance or by ratification, but must be specifically proven. This the evidence in this case fails to do, hence, the estoppel of Burch and French is confined to their own particular interests.

11. In conclusion I am opinion that all the plaintiffs herein are entitled to a perpetual injunction against defendants, enjoining them from collection of these assessments, excepting Wallace Burch and Tilden R. French, and as to the interests owned by them in their own rights respectively, the injunction will be denied.

Frank M. Coppock, Chas. T. Coppock, John W. Warrington, Wallace Burch, W. J. Davidson, for plaintiffs.

Frank Dinsmore, Rendigs, Foraker and Dinsmore, for defendants.

PROCEEDINGS IN AID OF EXECUTION—EXEMPTION.

[Scioto Probate Court.]

L. S. BECKETT v. E. H. WISHON ET AL.

1. In a proceeding in aid of execution against the superintendent of a county infirmary, in which it is sought to seize the wages of such superintendent; the county has a right to hold so much of the amount due the defendant, as superintendent, as will be necessary to satisfy the taxes due the county by such superintendent and apply it to their payment, and the county is not compelled to resort to its tax lien.
2. The wages, compensation or salary of a superintendent of a county infirmary, he being the head of a family, are "personal earnings," and are therefore exempt under the provisions of sec. 5430, Rev. Stat.
3. A watch and chain of moderate value, owned and habitually worn by the debtor, are exempt as "wearing apparel," under the provisions of sec. 5430., Rev. Stat.

BALL, J.

The plaintiff, a judgment creditor, brought two proceedings in aid of execution against the defendant E. H. Wishon, judgment debtor. The second proceeding sought to reach earnings of the defendant earned subsequently to the filing and hearing of the first motion. Both will be treated as one proceeding.

The defendant, Wishon, is the head of a family, having a wife and several children; he is superintendent of the county infirmary, and as such, receives \$50 per month, of which \$20 is for his wife, who is matron of the institution. When the first proceeding was instituted, there was due

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Wishon his August salary, and the second proceeding endeavors to reach his salary for September, October and November.

The defendant is also indebted to the county for taxes in the sum of \$92.10 on real estate, and \$9.41 on personal property. The treasurer of the county, on behalf of the county, maintains that he has a right to hold so much of the amount due the defendant, as superintendent, as will be necessary to satisfy the taxes due the county, and apply it to their payment. It is also the defendant's desire so to dispose of his wages. It is contended by the plaintiff, however, that the county, having a lien for taxes on the real estate and the right to seize personal property, in addition to the right to apply his wages to the payment of the taxes, has, in effect, two liens for the same debt, and therefore, can be compelled to resort to the security to which the plaintiff has no right, and to leave plaintiff all the wages now due defendant and upon which plaintiff claims a lien by reason of these proceedings. To this, however, we cannot assent. The county owes Wishon, and Wishon owes the county, and the county has a right to withhold the money due Wishon, and it is not compelled to resort to its tax lien.

The defendant further claims the amount of his salary in excess of the taxes, is exempt from execution and cannot be reached in these proceedings, under section 5430 Rev. Stat., which excepts—"the personal earnings of the debtor for three months, when it is made to appear that such earnings are necessary for the support of the debtor or his family." The plaintiff contends that this applies only to common, manual labor, and that Wishon is not such a laborer. The court cannot so hold. It is not necessary to follow the distinction sought to be made; it is sufficient to say that the wages, compensation, or salary which he receives, are certainly personal earnings, and therefore, exempt.

It is also shown by the evidence that Wishon is the owner of a watch of small value, a present to him from his brother, and a gold chain of small value, a present to him from his wife, both of which he wore and used constantly and had on at the hearing. The plaintiff seeks to have these applied to the judgment, while the defendant contends that they are exempt under the section referred to above, as "wearing apparel." This claim has given the court no little concern. There are only two cases in Ohio bearing on this case, so far as we have been able to find. In *Clary v. Protection Ins. Co.*, Wright, 228, it was held by the court, that—"A watch is a memorandum article, and not embraced in the common policy" of insurance as wearing apparel. The peculiar wording of the decision does not warrant us in saying the court holds that a watch is not "wearing apparel," but that it is of that class of articles which insurance companies always specifically mention, or do not include in the policy. Nor do we gather from the decision that the watch was one commonly worn by the insured.

The other Ohio case, one cited by the plaintiff, is *In Re George M. Lilliland, habeas corpus*, 7 Ohio Dec. Re., 659, but this case is not in point. The probate court of Cuyahoga had ordered Lilliland, on a proceeding brought against him by C. C. Lloyd & Co., to turn over to the sheriff, as receiver, a watch and chain. This Lilliland refused to do, and was proceeded against as for contempt. As far as the case cited shows, there was no contention that Lilliland was the head of a family and entitled to exemption, or that there was any claim of the watch being exempt as "wearing apparel." The point at issue in this case was not considered there at all, as far as the record shows; we are therefore without authority, as far as

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Ohio is concerned, and must weigh the matter in the light of these and other cases to which we shall refer.

In *Rothschild v. Boelter*, 18th Maine, 362; 29th Am. & Eng. Encl. Law, 40, in which it was held that a watch and chain, worth \$40 or \$50, worn by the debtor, was not exempt under the statute as "wearing apparel of the debtor and his family," the court say: "The words are to be construed in this case according to the common and approved usage of the language; namely, as referring to garments or clothing, generally designed for wear of the debtor and his family."

To the same effect is *Sawyer v. Sawyer*, 28 Vt., 252, wherein it was held that a watch, watch-key, watch chain, guard and seals, a finger ring, a sword and sword-belt, were not to be deemed as part of the wearing apparel of the deceased husband, which go to the widow under sec. 1, chap. 50, Vermont Comp. Stat.: "The court think this was a sound construction of the statute. They seem to me to fall clearly within the category of ornament. To call them 'wearing apparel,' is to give a latitudinarian meaning to the term which the legislature never intended it should have; though a watch may have a further use than mere ornament, yet that is not enough to make it and its incidents 'wearing apparel.' A finger ring is peculiarly a matter of ornament, and we are disposed to consider the sword and sword-belt as emblems of distinction worn on special occasions, and which are in no way attached to the 'wearing apparel,' so as to become a part of it." But Redfield, C. J., dissenting, says: "It seems to me that a watch which one wears, and the chain and seals, are dress and apparel."

In *Smith v. Rogers*, 16 Ga., 480, an insolvent moved to exempt from sale a watch which he claimed as part of his wearing apparel; his wife had claimed and been allowed a gold watch. The court say: "Various articles of property have, from time to time, been exempt by the legislature from this liability; but among these articles are not to be found watches, unless they come under the head 'wearing apparel.'" It is doubtful whether they can be made to come under that head; if, however, they can, we do think that not more than one can be made to do so.

As having some bearing upon the subject, see also, In *Re Thiell*, 4 Biss., 241; In *re Graham*, 2 Biss., 449; *Herman, Ex.*, sec. 99.

In *Gooch v. Gooch*, 33 Maine, 535, it was held that a watch which the testator had been in the habit of carrying upon his person, did not pass by the bequest of his "wearing apparel," nor by the bequest of his household furniture.

The question was somewhat thoroughly reviewed in the case of *Stewart v. McClung*, 12 Oregon, 431; 53 Am. R., 374, in which it was sought to require an insolvent debtor to surrender and deliver to his assignee, for the benefit of his creditors, a gold watch and chain, valued from \$50 to \$70. By the deed of assignment, the assignor excepts such property as was exempt from execution, without specifying the property. The contention was that a watch and chain may be properly considered as articles of "wearing apparel," and as such, exempt from execution and protected by his assignment. The court say: "Our statute provides that the 'necessary wearing apparel owned by any person to the value of \$100,' shall be exempt from execution, is selected and reserved by the judgment debtor or his agent. The question whether a watch is a necessary article of wearing apparel, and as such, exempt, seems from the decisions, to depend upon the particular facts or attendant circumstances of each case: such as, the value of the watch, the condition of business of the

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debtor, etc., and has been differently decided under different circumstances. If a watch is, in no sense, 'wearing apparel,' as some authorities indicate, the judicial construction of the word 'necessary' is of no consequence; on the other hand, it would seem, if a watch worn by a person may be considered as a part of his dress or apparel, the word 'necessary,' as judicially construed, would not so materially affect the meaning of the phrase 'wearing apparel,' as to exclude it. It is probably true that a watch is ordinarily worn more for convenience than as a mere luxurious ornament; but to determine whether it is one or the other, necessary, or luxurious as an article of dress or apparel, the value of the watch is allowed to have a controlling influence in determining that result. If the value of the watch be unreasonable, or too much money be invested in it, the law regards it as justice to the creditor would require, rather as a luxury than as a necessity; and under our statute, this judgment of value would necessarily become an important factor, as the exemption of 'wearing apparel' is limited to \$100. But as we have seen, upon the question whether a watch is a necessary article of wearing apparel, the authorities are conflicting. Upon the whole, our judgment inclines us to the opinion that the phrase 'necessary wearing apparel,' as used in our statute, may include in it a watch of moderate value, without doing violence to its meaning. We are not, therefore, prepared to say that a watch of moderate value is not a necessary article of 'wearing apparel,' and as such, exempt, when it is made to appear affirmatively that the watch, or other articles of apparel selected or reserved, do not exceed the amount limited by statute." After reviewing a number of cases, the court held: "A watch may be exempt from execution as 'wearing apparel,' upon affirmative proof that the amount of exemption is not exceeded."

In *re Steele*, 2 Flipp., 324, (U. S.), the meaning of the term "wearing apparel," used in the Bankrupt Act, was carefully considered by Hammond, judge of the United States District court for the western district of Tennessee. John Steele had been allowed a claim, as exempt, a watch, which he described as a plain, old-style, single-case, gold watch, which he had owned for twenty-five years or more, and which would scarcely sell for \$25. The question was, whether it could be held by him as exempt, under the law exempting "other articles and necessities," and "wearing apparel." The learned judge said: "It would not be doing any great violence to the meaning of the term 'wearing apparel,' as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word 'apparel,' as used by lexicographers, is not confined to clothing; the idea of ornamentation seems to be rather a prominent element in the word, and it is not improper to say a man 'wears' a watch, or 'wears' a cane. The exemption law of Arkansas says, that 'wearing apparel' except watches, shall be exempt." The court allowed John Steele the watch.

In *Bumpus v. Maynard*, 38 Barber, N. Y., 626, 29 Enc., 39, the debtor was in bed; his clothes were on a chair and his watch on a table. The officer was sued for refusing to levy on them, and it was held that they were exempt, as "wearing apparel," notwithstanding they were not on the person. There are some expressions in the case which indicate that possibly the court did not intend to include the watch as "wearing apparel," but it is probable that he did.

In *Mack v. Parks*, 8 Gray, (Mass.), 517, 69 Am. Dec., 269, it was held, in a case where an officer with attachment, asked a debtor to let

him look at his watch, and, being permitted, tore it from his person by breaking the guard by which it was attached, that the watch was exempt from seizure by common law, because, by that law, "wearing apparel" on the person was exempt from levy or distraint. The court say: "The justification on which the defendant relies, in answer to the trespass alleged in the declaration, depends upon the right of a sheriff, or other officer, to attach on mesne process, articles worn on the person of the debtor, as part of his dress or apparel. The watch, at the time it was taken by the defendant, was in the plaintiff's actual possession and use, worn as part of his dress or apparel."

In *Brown v. Edmonds*, (South Dakota), 59 N. W. R., 731, a watch and chain were held not exempt, as "household furniture;" but upon a motion for re-hearing, the court held in the same case, 66 N. W. R., 310, under the laws of South Dakota, which make absolutely exempt, "all wearing apparel and clothing of the debtor and his family," a watch and chain owned and habitually worn by the debtor, is absolutely exempt, as "wearing apparel," citing in support, *In re Steele*, and *Stewart v. McClung*, *supra*.

Webster says: "Apparel is the external clothing, vesture, garment, dress, garb, external habiliments or array," giving as a synonym "costume," "attire," "habiliments," etc. Dress, he says, "is that which is used as a covering or ornament of the body," and array, he says, "is rich or beautiful apparel."

The Century dictionary says, that wearing apparel means garments worn and made for wearing, dress in general; and speaking of watches, says: "Watches were invented about the beginning of the 16th century, and for a long time, the wearing of a watch was considered, in some degree, a mark or proof of gentility."

That apparel includes more than mere clothing, is laid down by all writers; but how much more, is unsettled. It would probably be giving the term too great a scope to say that it includes everything worn; but it does seem to the court that the weight of authority is to the effect that a watch and chain of moderate value, which has been worn for years by a person, become part of his "wearing apparel," and therefore, exempt from execution; and especially is this true when we remember that the statutes on exemptions are construed liberally.

The motion will be denied in each case, and the proceeding dismissed at cost of plaintiff.

CONSTITUTIONAL LAW—MOB VIOLENCE LAW.

[Champaign Common Pleas.]

MITCHELL'S ADMR. V. COMR'S OF CHAMPAIGN CO.

The act of the legislature, passed April 10, 1896, (92 O. L., 136), and entitled, "An act for the suppression of mob violence," is unconstitutional, for the reason that it is an encroachment of the legislative upon the judicial branch of the government, and by its terms necessarily deprives the defendants of the right of trial of material and disputed facts to a jury, and subjects them to the loss of property "without due course of law."

On demurrer to petition.

DUSTIN, J., (of Montgomery county).

This action is brought to recover \$5,000 from defendants, under the provisions of an act entitled: "An Act for the Suppression of Mob Violence," passed April 10, 1896, 92 O. L., 136.

For the purposes of said act a mob is defined to be "any collection of individuals, assembled for any unlawful purpose, intending to do damage or injury to any one, or pretending to exercise correctional power over other persons by violence, and without any authority of law;" and "any act of violence exercised by said mob upon the body of any person constitutes a 'lynching.'"

For the purposes of the act the term "serious injury" is defined. And parties injured may recover \$500 for assault, \$1,000 for serious injury, and \$5,000 for permanent disability to earn a livelihood by manual labor.

Section 5, provides that "the legal representatives of any person suffering death by lynching at the hands of a mob in any county of this state, shall be entitled to recover of the county in which such lynching may occur, the sum of five thousand dollars damages for such unlawful killing."

There is a section also, providing that every judgment shall include an order upon the county commissioners to levy a tax to pay the same.

The petition sets forth in detail the circumstances attending the sentence of Charles W. Mitchell for a felony, and his unlawful seizure, while in the hands of the sheriff, by a mob, June 4, 1897, and avers that "by reason of said acts of violence, said Charles W. Mitchell suffered death by lynching at the hands of said mob, in the county of Champaign, aforesaid."

The defendants have demurred to the petition, for want of facts, for want of jurisdiction of the subject-matter, and because the statute under which the action is brought is repugnant to and in violation of the constitution of Ohio and of the United States.

Some ten sections of the constitution, chiefly in the Bill of Rights, are cited as being contravened by the statute in question, but the argument centers about three propositions:

First—That the statute deprives the defendant of the right of trial by jury, which is in violation of sec. 5, of art. 1, of the constitution, which says that "The right of trial by jury shall be inviolate."

Second—That the statute is an attempted exercise of judicial power by the legislature, in violation of sec. 32, art 2, and sec. 1, art. 4, of the constitution; and

Third—That it provides for taxation for private benefit, instead of

public use, contrary to sec. 19, art. 1, and sec. 5, art. 12, of the constitution of Ohio.

The articles of the constitution of the United States that are alleged to be contravened, are not cited in defendant's brief, but I assume that they are articles 5 and 7, of the amendments, providing that no person shall be deprived of property "without due process of law," and that where the value in controversy exceeds twenty dollars, "the right of trial by jury shall be inviolate."

The statute in question being of recent enactment, and no statute with the same purpose in view having theretofore been enacted in Ohio, our Supreme Court has never been called upon to construe any of its provisions. A broad field is therefore open to argument, and counsel have not failed to avail themselves of the liberties and opportunities of the situation, and have presented their views from all possible standpoints; and I am much indebted to them for their elaborate briefs, showing wide research, much ingenuity and great learning in their preparation.

The questions involved are all constitutional, of the highest importance, and their settlement may have much influence on the peace and good order of society.

It is true that another section of the statute has been construed by the common pleas court of Cuyahoga county, in the case of *Caldwell v. Commissioners* (Cuyahoga county), 6 Ohio Dec., 367, and again in the circuit court of the same county. But as these decisions are not binding upon the courts of this county, and are only valuable in so far as they may be logical and well supported by other and higher authorities, I have endeavored to examine the questions without being biased thereby.

Taking up the questions presented in their natural order, the first would be, (without considering the special terms of this statute), "Has the legislature the right to pass a law making counties liable to individuals for personal injuries received from a mob?"

Section 1, of art. 2, of the constitution, reads:

"The legislative power of the state shall be vested in a general assembly, which shall consist of a senate and house of representatives."

"It will be observed that the provision is not, that the legislative power, as conferred in the constitution, shall be vested in the general assembly but that the legislative power of this state shall be vested. That includes all legislative power which the object and purposes of the state government may require, and we must look to the provisions of the constitution to see how far, and to what extent, legislative discretion is qualified or restricted."

Gholson, J., in *Baker v. Cincinnati*, 11 O. S., 542; see also *Lehman v. McBride*, 15 O. S., 573-591.

Defendants claim to have found restriction to the passage of such a statute in sec. 19, of art. 1, of the Bill of Rights, which provides that, "Private property shall ever be held inviolable, but subservient to public welfare."

They cite *City Railway Co. v. State*, 49 O. S., 201, but it seems to me not to apply. The act in question in that case was held to be unconstitutional for an entirely different reason, and because it was in contravention of sec. 2, art. 12, requiring property to be taxed by a uniform rate, etc., and the remarks of the learned judge in that case are not inconsistent with the view that this statute may provide a tax for the "public welfare."

The remarks of the same judge in *Board of Education v. State*, in 51

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O. S., 539, are cited, and will be referred to hereafter, in this opinion, upon another question in the case; but, although they only amount to a dictum, they are so far from agreement with the views of the defendants herein, that they expressly concede "that the general assembly may authorize one of the political subdivisions of the state to levy a tax, not legally enforceable, but founded upon a moral consideration, or may even command that a levy be made for that purpose." (See page 540.)

On the contrary, in the case of *Darlington v. Mayor*, 31 N. Y., p. 164, "An act for compensating parties when property may be destroyed in consequence of mobs or riots," was declared constitutional. The same points were made in that case as in this, but Denio, Ch. J., a learned and eminent jurist, on page 187, says: "The policy on which the act is framed, may be supposed to be, to make good, at the public expense, the losses of those who may be so unfortunate, as without their own fault to be injured in their property by acts of lawless violence of a particular kind, which it is the duty of the government to prevent, and further, and principally, we may suppose to make it the interest of every person liable to contribute to the public expenses to discourage lawlessness and violence, and maintain the empire of the laws established to preserve public quiet and social order. These ends are plainly within the purposes of civil government, and, indeed, it is to obtain them that governments are instituted: And the means provided by this act seem to be reasonably adapted to the purposes in view."

The learned judge then proceeds to give a history of similar legislation, showing that it has been in existence in England for a thousand years, citing a law of King Canute, holding the village liable in case a murder was committed within its bounds and the slayer escaped. Similar statutes existed under the reign of the Norman Kings and Queen Elizabeth, George I and George II, and the policy of compelling a local community to answer with their property for acts of violence committed by others, has been considered by the English Parliament as a supplement to, rather than a violation of, the Great Charter.

Farther on the judge says: "When the state undertakes to indemnify the sufferers from riots, the executing of that duty (viz., the raising of the amount by taxation) is a public concern, and the expenditure is on public account." It is a public use in the same sense as the expenditure of money for the erection of court houses and jails, the construction of roads and bridges and the support of the poor. It is taken for an object which the legislature has determined to be of public importance and for the interest of the state." This is a leading case, involving important interest, and the decision of the court is exhaustive and at great length.

Similar statutes have been held constitutional in Pennsylvania and Louisiana. *Allegheny Co. v. Gibson*, 90 Pa. St., 76; *Williams v. New Orleans*, 23 L. Am., 507; and have been unquestioned in New Hampshire, Kansas, Alabama and California. 45 N. H., 214; 9 Kan., 315; 46 Ala., 118; 55 Cal., 322.

The statutes considered in these cases, except in Kansas and Alabama, have been for the recovery of damages for injuries to property. In Kansas and Alabama the statutes provide for damages for injuries to persons.

In *Underhill v. Manchester*, 45 N. H., 221, the purpose of the statute is very well stated as follows: "The object of the statute, evident in itself, as well as shown by the history of similar laws, is to prevent and suppress riots. The course taken is first and chiefly punitive, in making

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the loss of property destroyed by mobs a charge upon the town treasuries, thereby joining the personal interest of the taxpayers with the official duty of the local authorities, and arraying both against violators, with a new motive to discover, discourage, over-awe and over-power, all riotous proceedings and tendencies; secondly, remunerative, in encouraging every one to oppose mobs by giving indemnity for property destroyed in consequence of efforts to preserve order. The act is not founded solely upon the theory of insurance, with taxes as premiums. The end to be accomplished is not merely compensation for loss, but prevention of loss, with compulsory compensation as the incentive means."

The alleged unwisdom and injustice of the statute has been much commented on by counsel, and its liability to abuse, by collusion between two or three persons who might assume to be a mob, assault one of their own confederates, who would sue the county for \$500 and divide the proceeds with his friends, the assailants, who composed the alleged mob.

It is not the province of courts, it seems to me, to consider the wisdom or expediency of the law, but to examine its form, determine if possible its purposes, and decide whether or not it is valid and constitutional. It is for the legislature to determine as to its wisdom, necessity, or expediency, which is not for the courts to gainsay. But in this case, which so intimately concerns the administration of justice, the legislature may well be commended for its attempt to aid the dignity and power of the law, and to insure its respect.

It is humiliating, perhaps, to realize that in the commonwealth of Ohio, so advanced in education and civilization, such a law should be deemed necessary, but the country has lately been so startled by lynchings and burnings, especially throughout the south, that I doubt not the legislatures of many states will soon enact similar laws to the one in question. Some such repressive measures seem to be necessary, to make communities realize that the safety of the innocent as well as the punishment of the guilty, require complete submission to the law: That if a wild mob is to determine whether or not a penal law is sufficiently punitive, and assume the duties of organized courts, which may be considered by them in their frenzy as too lenient or too dilatory, then the next step is anarchy, and the next chaos, and the community would soon be in a whirl of unrest, with no dominating power but brute force. The slightest departure from the path of safety is like allowing a rivulet to trickle over the dikes of Holland. The least concession to lawlessness, no matter what the provocation, is a weakening of the foundations of society.

In passing from savagery to civilization, we have yielded the individual right of executing retributive justice to the state, and there it should remain, even though in exceptional instances the state may fall far short of our ideas of a just retribution.

It seems to me, therefore, that a law having for its purpose the suppression of mob violence, even though in its operation it provides for a tax upon innocent citizens, is a law for the public welfare and that the tax would be legal.

The next question is: Has the legislature in this statute attempted an exercise of judicial power, in violation of sec. 32, art. 2, and sec. 1, art. 4, of the constitution?

From the foundation of our government until now, it has been the purpose of the constitutions, state and federal, to keep the three co-ordinate branches of government, the executive, legislative and judicial, dis-

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tinctly separate. Encroachments of the one upon the other have been watched, and guarded against, with extreme jealousy. If the courts attempt to legislate by construing statutes contrary to the manifest intent of the legislature, or, if the legislature attempt to decide controversies between man and man, and thus usurp the province of the courts, or, if the executive attempts, with a high hand, to assume the functions of either or both the other branches, there is an immediate and just protest and resistance. If the distinction between the branches is broken down, so that they are no longer a check upon each other, then the government will be working at cross purposes, and the only relief will be in a monarchy, where the ruler combines the powers of the three branches. In our present form of government the legislature has no more right to assume the prerogatives of the courts than has a mob.

It is claimed that in the statute under consideration the legislature has encroached on the prerogative of the judicial branch of government in this, that it assumes to fix and determine the amount of damage sustained by the next of kin of a deceased person, by reason of his death at the hands of a mob, thus varying and ignoring the rules of law which require that such issues of fact should be submitted to a jury for determination, under the instructions of a court and the usual forms of trial.

There is a statute in Ohio limiting the amount of recovery in case of death by wrongful act to the sum of \$10,000. The constitutionality of that act has not been questioned, for it has been conceded that the legislature, on the grounds of public policy, may limit the maximum recovery. But it does not pretend to fix the minimum. It is left for a jury to say, considering the age, health, occupation and earning capacity of the man, what his life was worth to his next of kin, for which a verdict may be awarded not to exceed \$10,000.

The legislature, of course, knew that the lives of all men liable to be killed by mobs would not be worth \$5,000 each to their next of kin. Some might be worth more, but many would doubtless be worth less on account of age, infirmities, dissolute habits and small earning capacity.

To the extent, therefore, that in any case where the loss to the next of kin may be less than \$5,000, the legislature has provided for a donation of the difference between the real loss and the sum of \$5,000, and authorizes a levy for its payment. In other words, the statute provides not only for compensatory damages in all cases, but for gratuities in many of them. In all cases (except one) to which I have referred, in which statutes having a similar purpose in view were held to be constitutional, there was provision only for compensatory damages, and the amount recoverable was not fixed and determined except in one instance, in Alabama, and in that case the point here raised seems not to have been suggested at all, and the court makes no allusion to it. So, I think I am safe in saying, that nowhere in this country except in the Alabama case referred to, has such a law been held to be constitutional, where the amount recoverable was fixed, and that such a provision makes it invalid and unconstitutional, unless it is saved by the holding of our Supreme Court in *Railway Co. v. Cook*, 37 O. S., 265.

The action in that case was based upon the statute, 71 O. L., 146, compelling a railroad company which over-charged to pay the aggrieved party a sum double such over-charge, but in no case to be less than \$150. The plaintiff was over-charged five cents in two instances, and recovered \$300. The railroad company made the point that the legislature had exceeded its powers, and had deprived the defendant of the right of trial by

jury, etc. The Supreme Court overruled the objections, and sustained the judgment of the court below.

Upon this holding the plaintiff in this case chiefly relies, but it seems to me that there is a manifest distinction between the two statutes. In the railroad case the judgment authorized for the excessive damage was a penalty assessed against the guilty party, a private corporation, a creature of the legislature, for disobedience of the provisions under which it was allowed to operate. In this case the statute provides not for a judgment against the guilty individual or private corporation, but against a board representing a political sub-division, a county, the payment of which judgment requires a levy upon the property of all persons within the county, the guilty and the guiltless; and a levy, as we have seen, can only be for public use and welfare; and, following the precedents cited, can be compensatory only.

The view that this law is unconstitutional, for the reason that it is an encroachment of the legislative upon the judicial branch of government, and by its terms necessarily deprives the defendants of the right of trial of material and disputed facts to a jury, and subjects them to the loss of property "without due course of law," I think is sustained by *Hanson v. Vernon*, 27 Iowa, 28; *Board of Education v. State*, 51 O. S., 539; *Ervine's Appeal*, 16 Pa. St., 257; *Ponder v. Graham*, 4 Fla., 23; *Caldwell v. Board of Com'rs*, 6 Ohio Dec., 367.

Upon consideration of the whole matter, therefore, I am of the opinion that the statute is unconstitutional, and the demurrer to the petition will be sustained.

PARTITION.

[Hamilton Common Pleas.]

GLEMSER ET AL., BY NEXT FRIEND, V. GLEMSER ET AL.

1. It is not permissible for a party to raise, or attack collaterally in another proceeding, errors that may have occurred in a previous partition proceeding; and, therefore, whatever mistakes or errors may have occurred in such partition proceeding, it is for the party aggrieved in that proceeding to prosecute his suit in error, and not wait and attack it collaterally in some other proceeding brought to set aside the original partition.
2. A person standing in the capacity of a guardian or trustee, and having—as in this case—a dower interest in the property, may purchase such property at a sale under a proceeding in partition, instituted by a third person.
3. In partition proceedings, where a party interested in that proceeding, either personally or as trustee, becomes the purchaser and is bound to pay over money, which under distribution and order of court would be received immediately back by him as such trustee or in his individual capacity, the law does not contemplate that he should actually pay over in cash the full amount, but if in the accounting he acknowledges to have received that money, either in his personal capacity or as trustee, then in that capacity a receipt so given is the same thing as though he had actually paid the money in cash.

SMITH, J.

The petition in this case states that the plaintiff, Ella M. Glemser, was eighteen years of age on September 23, 1895, and that Thekla M. Glemser is a minor, aged thirteen years; that said plaintiffs and the defendant Charles E. Glemser are children of Frederick Glemser, deceased, who died on April 19, 1882; that Frederick Glemser left a will, which was duly probated by the probate court of this county, on April 26, 1882; that the defendant, Marie Glemser, is the widow of Frederick Glemser; that the defendant, Charles E. Glemser, is the son of Frederick Glemser by a former wife, and that after her death the said Frederick Glemser married Marie Glemser, the defendant herein; and that

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plaintiffs are the children of said Frederick Glemser and the defendant Marie Glemser; that under the will of the said Frederick Glemser, Marie Glemser was appointed guardian, in April, 1882, of the plaintiffs, and that she has always acted as such guardian up to the present time. The petition then sets out that Frederick Glemser was the owner in fee simple, of two pieces of property in the city of Cincinnati, situated on the east side of Elm street north of Fifteenth street; that, in addition to the real estate left by said Frederick Glemser, there was personal property also left by him, amounting to about \$20,000; and that the estate of said Frederick Glemser is still unsettled, but all the debts of the said Frederick Glemser have been paid.

The petition further states that on or about December 16, 1893, the defendant Charles E. Glemser, filed his petition in the court of common pleas of Hamilton county, against the plaintiffs and against the defendant Marie Glemser, both as guardian and as widow of said Frederick Glemser, setting up that he had a lawful right to be seized in fee simple of one undivided third part of the real estate situated on the east side of Elm street, subject to the dower of the said Marie Glemser; and prayed for a partition of said property; that afterward proceedings were had on said petition; that an answer was filed in behalf of the plaintiffs herein by the said Marie Glemser, their guardian, but no defense was in fact made in their behalf by said guardian, and that the rights of the plaintiffs in said partition suit were in no way represented; that on or about June 21, 1894, a decree was entered in said cause, finding that the plaintiff Charles E. Glemser had a legal right to the undivided one-third of said real estate, and was entitled to hold the same in severalty, and that the plaintiffs in this case were tenants in common with him, each of one undivided third interest in said premises, and an order was made that the defendant Marie Glemser be endowed of one-third part of said premises, and that subject to her said dower, partition of said estate be made, and that an order issue to the sheriff of this county, commanding him by the oaths of three freeholders of the vicinity, who were appointed commissioners for that purpose, that he set off to the said Marie Glemser her dower, and to the plaintiff Charles E. Glemser, and the defendants in said action, the plaintiffs herein, their proportions of said estate in severalty, and that if said commissioners should find that said premises could not be divided without manifest injury thereto, it was ordered that they appraise the same both subject to and free from the dower of said Marie Glemser. That thereafter a writ of partition was issued to said sheriff, and on or about September 15, 1894, no division having been made, the commissioners appraised the parcel of land first above described at \$13,600, and the second at \$10,500, free from the dower of said Marie Glemser; that they did not appraise, nor did they return the appraisement thereof subject to the dower of said Marie Glemser, as provided in said decree for partition.

The petition then states that on October 17, 1894, the court caused a decree to be entered, confirming the report of the commissioners, and finding that the premises could not be divided by metes and bounds without injury thereto, and that the appraisement of said premises free from the dower of the said Marie Glemser was in all respects in conformity to law, and did approve and confirm the same; that neither of the parties elected to take the premises at the appraisement, and it was ordered that the said premises be sold on the premises on the terms of one-third cash, and the balance in equal payments in one and two years, bearing six per cent. interest, and secured by mortgage on the premises;

that the sale was thereafter duly held on December 3, 1894, at public outcry, and that both pieces of property were struck off and sold to the defendant Marie Glemser, the first parcel for \$9,520, and the second parcel for \$7,000, total, \$16,520.

The petition then further states that the purchaser, Marie Glemser, did not pay to the sheriff the said purchase money, or any part thereof; that all the defendants knew that Marie Glemser was the guardian of these plaintiffs herein, and that with full knowledge of said facts all the defendants agreed among themselves, that the sheriff should make his return of the sale without any money having been actually paid to him by said purchaser Marie Glemser, and that said sale should be confirmed, and a deed executed and delivered to her, without the actual payment to the sheriff of any money whatever; that afterwards the defendant, the Gilt Edge Building and Loan Company, agreed to loan to the purchaser, Marie Glemser, the sum of \$9,000 to be secured by her by a mortgage on said property, for the purpose of paying off the proportion of the fund to which the said Charles E. Glemser and the dower claim of said Marie Glemser would amount, the dower claim of the said Marie Glemser being consumed by judgment liens against her interest in the said property; and that it was agreed between the Gilt Edge Building Association, the said Marie Glemser, Charles E. Glemser, and her judgment creditors, that the money received on the mortgage, by the purchaser, from the Gilt Edge Building and Loan Company, should be distributed in payment of these claims—\$875.20 due for taxes, the costs, and also \$265.20 to the attorney for the plaintiff Charles E. Glemser, in said action, all together amounting to \$635.23; that in pursuance of said arrangement the said Marie Glemser, the purchaser, defendant in this case, receipted upon the sheriff's books for two sums of \$3,826.88 each, as guardian of the plaintiffs, Ella M. and Thekla M. Glemser, although in fact she had not received the said sum or any part thereof, and that this was done in order to carry out the arrangement heretofore alleged to have been made, and that in pursuance of said arrangement the Gilt Edge Building and Loan Company paid off the costs and taxes, the amount due to the said Charles E. Glemser, and to the creditors of Marie Glemser certain sums, leaving a balance of \$1,733.34, which was paid over to the attorney of Marie Glemser, W. S. Little. The petition then further sets out that the purchase of said property by the said Marie Glemser was illegal and void by reason of her being the trustee and guardian of plaintiffs; that she did not receive at any time the sums above set forth, as guardian of plaintiffs, nor any other sum whatever; and that the arrangement by which they were divested of their two-thirds interest in said property is fraudulent and void, and that no money whatever was paid in to the sheriff in said action, and that all of the defendants knew this. The defendants, Otto Steinborn, John Miller, William Fangmeyer and Margaret Landesvater, are made parties defendant, for the reason that they claim to have judgments against the defendant Marie Glemser.

The plaintiffs ask, in this suit, that all the proceedings in said partition suit, including the decree for partition, the attempted partition of said lands by said commissioners, the sale and confirmation thereof, as set forth, be set aside and held for naught, and that the defendants herein be enjoined from setting up any claim against the said interests; that their title to said property may be quieted as against them, and that they be restored to their rights as owners of the undivided two-thirds interest in said premises.

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The answer of the Gilt Edge Building and Savings Company denies that the said Frederick Glemser left a large amount of personal property, worth about twenty thousand dollars, or any other sum, and denies that the executors under the will of said Frederick Glemser received said personal property or the assets of said estate, and denies that the said estate is still unsold. It also denies that in the partition proceeding set out in the petition, no defense was in fact made in behalf of said plaintiffs by their guardian in said action, and denies that the rights of the plaintiffs were not represented, but alleges that an answer was filed in said proceeding on behalf of said plaintiffs by their guardian, Marie Glemser, their mother, and also an answer filed on behalf of said plaintiffs by C. K. Shunk, their duly appointed guardian *ad litem* in said proceeding, and that defense was made for them, and their rights represented and protected. The building association further denies that Marie Glemser did not pay to the sheriff the purchase money of said property in said partition sale, and denies that it had any knowledge that the said Marie Glemser had not paid to the sheriff said purchase money, and denies that it agreed with the other defendants herein, or with any one, that the sheriff should make a return of the sale without any money having been actually paid to him by the said Marie Glemser, purchaser, and denies that it made any agreement that the sale should be confirmed and the deed executed and delivered to the said Marie Glemser by the sheriff without the actual payment to him of any money whatever, and denies that any such agreement was made by any one.

The building association admits that it agreed to loan to said Marie Glemser the sum of nine thousand dollars to be secured by a mortgage to be executed by her to it on said property, and says that it did loan said Marie Glemser the said sum of nine thousand dollars, and that the said Marie Glemser did execute to it a mortgage on said property securing said loan; but it denies that it agreed to loan said money or that it did loan said money in pursuance of any agreement on its part or the part of any person, to have the sheriff make a return without receiving any payment for said property. It further denies that it was agreed between it and the said Marie Glemser and Charles E. Glemser or any judgment creditor, that the money realized on the said mortgage should be distributed in payment of any special sum, and denies that in pursuance of any arrangement or agreement, the said Marie Glemser receipted to the sheriff for the sum of \$3,826.88 as guardian for the plaintiff Ella M. Glemser, and the sum of \$3,826.88 as guardian of the plaintiff, Thekla M. Glemser, and denies that the said Marie Glemser did not receive said sum or any part thereof from the said sheriff, and that said signing was done by Marie Glemser in order to carry out any arrangement between the building association and the said Marie Glemser, Charles E. Glemser and the judgment creditors of Marie Glemser. The answer further alleges that the said Marie Glemser paid for each and all the parcels of land purchased by her in said partition proceeding, the full consideration called for by the deeds executed and delivered to her by the sheriff for said premises. It alleges that she paid the full purchase price for which said premises were sold to her in said action, and that the price she paid for said premises was the full value for each and all of said premises. It further alleges that the said Marie Glemser purchased said property, and paid the purchase price therefor, received the sheriff's deeds for the same, and took possession thereunder, and procured the said loan from this defendant, and executed her said mortgage to it with

the full knowledge of the plaintiffs. It further alleges that the money loaned by it the said Marie Glemser as paid by the said Marie Glemser to the sheriff in payment for said premises, and that the same, together with the balance of said purchase price, paid to said sheriff by said Marie Glemser, was distributed by said sheriff under the order of the court in said partition proceeding in payment of costs, taxes and other liens and the distributive shares of the various parties to said partition proceeding. Defendant also denies that the purchase of said property by Marie Glemser at the time, in her own right, was illegal and void, and denies that she did not receive the sums due the said Ella M. Glemser and Thekla Glemser as their guardian; denies that the said plaintiffs were divested of their interest in said property by any fraudulent or void arrangement, and also denies that no money whatever was paid into the sheriff in said action, and denies also that it had any knowledge that no money was paid into said sheriff.

As a second defense the building association alleges that the plaintiffs, Ella M. Glemser and Thekla Glemser, are the children of Marie Glemser; that she procured and induced plaintiffs to bring this action, and that this action was brought by the plaintiffs by collusion with the said defendant Marie Glemser, for the purpose of defrauding this defendant, the building association of its mortgage upon the property described in the petition, and for no other purpose, and that this action is brought through the connivance and collusion of said Marie Glemser with said plaintiffs, and asks to be dismissed with its costs.

The defendant, the Gilt Edge Building and Savings Co., filed an amendment to their answer and say that said Marie Glemser, the defendant, as guardian of the estates of said Ella M. Glemser and Thekla Glemser, paid out for each of said parties and for the benefit of their respective estates more than the amount she received or was entitled to receive from the sheriff and from all other sources for them or each of them, for the benefit of their estates, and that, after crediting each of said minors and their respective estates with the amount distributed to her as guardian of said minors, and all further sums received by her for them and their estates, said minors are each of them indebted to her. It further alleges that it is entitled to be subrogated to the rights of said Marie Glemser as guardian of the estate of said Ella M. Glemser and Thekla Glemser against said plaintiffs and their respective estates.

For further defense the defendant alleges that it is the mortgagee for value in good faith as alleged in its original answer, and that if the sale of the premises alleged in the petition is invalid from any cause, it is entitled to be subrogated to the rights of all parties paid from said sum of nine thousand dollars so loaned by it on the mortgage aforesaid.

The other defendants in this action being judgment lien holders, deny the material allegations of the petition, and each set up by way of answer and cross-petition their respective judgment liens.

This case therefore presents three questions: First—The question involving the validity of the original partition proceedings in case No. 98860, Hamilton county common pleas court, in which the sale of this property was had and Mrs. Glemser obtained the title by purchase at sheriff's sale.

Second—That as guardian of the minors, Ella M. Glemser and Thekla Glemser, Marie Glemser being a trustee of their estates, had no right to purchase this property in her individual capacity, and that the sale to her therefore by the sheriff was void, and

Third—That not having actually paid to the sheriff of this county the full amount in cash of what would be the distributive shares belonging to each of the minors on distribution, the sheriff could not convey title to Marie Glemser, and the sale to her in this respect was void.

The evidence shows that partition proceedings were had in the Glemser estate in 1893, whereby, after various orders of the court, the property was duly appraised and ordered sold; that the plaintiff in the case was Charles E. Glemser, who was interested in said property to the extent of having an undivided one-third thereof: that Marie Glemser was entitled to dower in said premises, and that Ella M. Glemser and Thekla Glemser, the plaintiffs in this case, were each entitled to one undivided one-third; that such proceedings were had in partition that the sheriff offered said premises for sale, and that the same were purchased by said Marie Glemser; that after the confirmation of said sale the sheriff was ordered to transfer to said purchaser, Marie Glemser, said property upon her paying the purchase price therefor, the same having been changed from one-third in cash and balance in one and two years to all in cash; that the said Marie Glemser not having all the money in cash, applied to the Gilt Edge Building and Savings Company for a loan upon said premises, and secured from the Gilt Edge Building and Savings Co. sufficient money to meet all the liens including her dower interest and the amount coming to Chas. E. Glemser against said property, excepting the amounts due Ella M. Glemser and Thekla Glemser, which were payable to and due to her as their guardian; that the sheriff did not receive \$16,520, the purchase price from the purchaser, but only received \$1,510.43, which covered the costs, taxes, etc. against the property, the balance of the money being paid direct to Charles E. Glemser and the various lien holders, who, upon payment, duly signed for the amount so received by them upon the sheriff's books, and the shares or the amounts coming to Ella M. Glemser and Thekla Glemser, minors, were receipted for by Marie Glemser, their guardian.

An attack is made upon the partition proceeding for certain reasons, among which, it is claimed by the plaintiffs that the defense made by the guardian *ad litem*, in said cases was not sufficient, and that there were errors of the court in changing the terms of sale from one-third cash and balance due in one and two years, to all cash. But the court is satisfied upon an examination of this question, that it is not permissible for a party to raise, or attack collaterally in another proceeding, errors that may have occurred in a previous partition proceeding that could and should have been corrected, reviewed and remedied in that proceeding. whatever mistakes or errors may have occurred in a partition proceeding, it is for the party aggrieved in that proceeding to prosecute his suit in error, and not wait and attack it collaterally in some other proceeding brought to set aside the original partition. Its judgment cannot be impeached collaterally for errors of law or irregularities in practice.

A sale in partition is a judicial sale; the purchaser is protected by the judgments of the court as fully as in any execution or judicial sale. If the court acted erroneously in deciding upon the sale, or committed any other error, this should have been corrected by appeal or by some other appropriate proceeding in the partition suit. Not being so corrected, the parties interested have acquiesced in, and ratified it; and they cannot employ it in any collateral manner to defeat the purchaser's title.

In addition to cases cited, see, *Freeman on Co-tenancy and Partition*, sec. 548. *Foster v. Dugan*, 8 O., 87; *Miller v. Peters*, 25 O. S., 276; *Landon v. Payne*, 41 O. S., 303.

It seems to the court that this proposition is too well settled to be further considered. Such errors or irregularities, therefore, as may have been committed in the original proceeding in this suit, it is now, in this case, too late for the court to entertain.

Second, it is also alleged by counsel for plaintiffs that the sale made in the partition case is void, and no title passed, for the reason that Marie Glemser, guardian of said minors, purchased said property. That is, that Marie Glemser, being a trustee, would be deprived of purchasing or getting a good title at her own sale. Counsel, however, overlook the fact that this was not the sale of Marie Glemser, guardian, or as a trustee. The partition suit was brought by Charles E. Glemser, who had an interest of one-third in the property. He was entitled to have the property partitioned. Suit was brought, and the sheriff was ordered to sell. The sheriff did sell. Marie Glemser had an interest in the property, that is, had a dower interest, and under the statute had a right, if she so desired, to elect to take the property herself. She was not therefore conducting a sale of her own as trustee, but was attending a sale by another officer, that is, the sheriff. If she had the right under the statute to elect to take the property, she surely then would have the right to purchase, if she saw fit. The cases cited therefore by counsel for plaintiff are such as relate to trustees holding strictly in the capacity of trustees, who make the sale themselves, and as the law has wisely held, they shall not benefit by any sale of their own, they are prohibited from purchasing at such sales. But in this sale, it was not a sale of Marie Glemser's, as guardian, but was a sale brought about on the petition of Charles E. Glemser, who was entitled to his third in the property, and was a sale made by the sheriff, in a proceeding in which the statute gave her a right, being one of the parties to the suit, and interested in the property, which is not denied, to elect to take the estate at its appraised value, if she saw fit. She was not here both seller and buyer. The sheriff was interposed by the court to make the sale.

See cases cited, and *Twin Lick Oil Co. v. Marbury*, 91 U. S., 587. *English v. Moneypeny*, 8 Ohio Circ. Dec., 582. Affirmed without report by Supreme Court, 37 W. L. B., 180. Application for rehearing denied by Supreme Court, 37 B., 280.

In *Allen v. Gillette*, 127 U. S., 589, the Supreme Court of the United States criticises the stringent rule laid down upon this subject in *Perry on Trusts*, and *Hill on Trustees*, and says that the language employed by them does not present a thorough and perfect generalization of the essential principles pervading the decisions upon this subject.

Therefore we think that this ground of complaint is not well taken, as it is not a purchase by a trustee of property at his own sale, as contemplated in the cases cited.

Third, it seems to the court that the real controversy in this case arises in the manner in which this sale of the property was conducted in the sheriff's office. It appears from the evidence that Marie Glemser had determined to purchase this property; that two-thirds of the appraised value was \$16,520; that being the guardian of her two daughters, she conceived the plan of borrowing sufficient money from the defendant building association to cover her own dower interest, which

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had been subjected to judgment liens, the amount due Charles E. Glemser, the plaintiff in the partition suit, the costs and delinquent taxes, and in fact all claims and liens against the property, excepting the shares due the plaintiffs in this action, or due her as guardian of said plaintiffs; that she made application to the building association, and upon an examination of the title by John Galvin, whom the court finds from the evidence, was the attorney for the building association, it decided to loan her the sum of nine thousand dollars; that these nine thousand dollars were placed in the hands of Maurice Galvin, who did not pay it to the sheriff, but repaying to the sheriff's office, after said property had been bid in by Mrs. Glemser, with Mrs. Glemser present, and also the attorneys for the various lien holders against the dower interest of Mrs. Glemser, he proceeded to pay to the sheriff the amount of the delinquent taxes, the costs of the suit, to the attorneys of the various lien holders, the amounts of their liens, and to the attorney of Charles E. Glemser, the amount due him under the decree. Upon the payment of such amounts from him, the attorneys for the various lien holders against the dower interest of Marie Glemser, the attorney for Charles E. Glemser, and Marie Glemser, guardian of Ella M. Glemser and Thekla M. Glemser, each receipted upon the books of the sheriff for the full amounts found due by the court, and ordered paid to them in the original partition suit.

In other words, it is claimed, that as no money was paid to the sheriff except costs and delinquent taxes, and the balance of the money, up to the extent of nine thousand dollars, was paid by Maurice Galvin to the various lien holders and to the attorney of Charles E. Glemser, and as nothing was actually paid by Mrs. Glemser to the sheriff for the shares of the two minor children, the statute was not complied with, and no title passed.

It is contended by the defendant, the building association, that while this statement is true, nevertheless it was not necessary for Mrs. Glemser to actually pay in cash to the sheriff all the amounts of the liens, including the shares of the two minor children, and then for all parties to receive back from the sheriff these amounts, whereas the same thing would be and could be accomplished by all parties and Mrs. Glemser, guardian, receipting upon the books of the sheriff for the sums so ordered paid to them, and in Mrs. Glemser's case, for the amounts due her as guardian, she being the guardian of both children.

This, therefore, is the technical fraud which it is claimed in the petition that Mrs. Glemser, as guardian of her two daughters, perpetuated, together with the building association, whereby it is sought to set aside the sale of this property to her, and to give the plaintiffs in this case a vendor's lien prior to the mortgage of the building association.

It is also claimed in this respect that the building association had notice that Mrs. Glemser in purchasing this property was not paying anything to herself as guardian for the interest of these two minor children. This claim is based upon the fact of the report to the building association, and also upon the fact that the checks were handed to Maurice Galvin by the building association to pay off these prior incumbrances and liens, and the claim is also made that Maurice Galvin was the attorney for the building association and not John Galvin. In this regard, however, the court is satisfied from the evidence that there was but one attorney for the Gilt Edge Building and Saving Company, and that was John Galvin, who was under bond to the company, and

who had been, according to the minutes of the company, the only elected attorney for that corporation. The evidence further discloses that Maurice Galvin in this transaction represented Mrs. Glemser, and not the building association, and that when these transactions took place at the sheriff's office, John Galvin, the attorney for the building association, was not present, but they were conducted by Maurice Galvin, representing Mrs. Glemser, the sheriff and the various attorneys for the different lien holders. Therefore, there is no evidence that the court could find or base a finding upon, that there was notice, either actual or constructive, to the building association, that Mrs. Glemser had not paid what the decree of court ordered should be paid for this property.

Counsel for plaintiffs also claim further, that even if there was no notice to the building association of this want of consideration paid to the sheriff, that nevertheless, under our statute, which says that the sheriff upon payment of the consideration money, shall execute and deliver a deed to the purchaser; that therefore Mrs. Glemser not having paid in cash as provided by the order of court to the sheriff, the amount of the purchase price, that therefore there was a fraud practiced upon her minor children for whom she was guardian, and that they would have their vendors' lien. In this regard, it seems to the court that the statute, while its language is such, and uses the word payment, nevertheless it is for the court to construe what is meant by the word payment, particularly in partition suits, where a party to the suit purchases the real estate. Mrs. Glemser was interested to the extent of her dower in the real estate sold. She was also interested as guardian for each of her own daughters, in the real estate sold. Having the right to purchase as the court has hereinbefore found at this sale, she concluded to do so, and paid all the money necessary for such purchase, except the amount which would come back to her as guardian of her two minor daughters. In other words, the question is raised, whether or not she had to absolutely and actually pay over the counter of the sheriff money, which after the sheriff would receive, he would immediately hand back to her. It seems to the court that in partition proceedings, where a party interested in that proceeding, either personally or as trustee becomes the purchaser and is bound to pay over money, which under distribution and order of court would be received immediately back by him as such trustee or in his individual capacity, that the law does not contemplate that he should actually pay over in cash the full amount, but if in the accounting, which in law is the same thing, he acknowledges to have received that money either in his personal capacity or as a trustee, then in that capacity a receipt so given, and which would be, as in this case conclusive against him, it is the same thing as though he had actually paid the money in cash.

In Bloodgood's estate, 8 Penn. Co. C. Reports, 545, the court lays down the rule that where a party to a partition suit entitled to purchase that property does purchase it, he need only pay to the sheriff a sum sufficient to provide for the expenses of the sale, the compensation of the trustee and the payment of the liens which may appear of record against the co-tenants. In this case the court says: "It would seem reasonable, if these were provided for, that all the co-tenant should pay in cash would be his proportion of these costs and expenses, compensation, etc., and the amount of the liens appearing against him. The only person really affected by the non-payment of the actual cash bid are the officer making the sale, lien creditors and those who conducted

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the sale, such as the auctioneer for his commissions, advertising, etc., but these can be protected. * * * In his account to be filed he would therefore charge himself with the actual amount of cash received by him and with a note attached stating the amount of receipts held by him, so that in final distribution to the heirs these receipts would be computed and considered as so much cash paid to the respective heirs or co-tenants."

In other words, applying this case to the one at bar, the sheriff being the officer making the sale would charge himself with the actual cash received by him, and the amount of the receipts held by him, which receipts he can compute and consider as so much cash paid to the respective heirs or co-tenants.

The money due the guardian of Ella M. Glemser and Thekla Glemser is represented by the receipt of their guardian; and in the case at bar the court cannot see nor make any distinction between Mrs. Glemser personally and Mrs. Glemser, guardian, when it comes to the actual, absolute payment of money.

If such an accounting by the sheriff can be had, and he be relieved, then his account which cannot be disputed would show that Mrs. Glemser personally paid to, and as guardian received from the sheriff the amounts found due and ordered paid to the plaintiffs in the original partition suit.

Under our statute, and as conforming to the order of sale and distribution, Mrs. Glemser being the purchaser of the property individually, and at the same time the guardian of her children, the sheriff would have the right to conduct the matter of distribution as he did, and if he, as sheriff, has this right, then the plaintiffs in this suit cannot complain that the guardian did not pay the actual amount of the purchase price to the sheriff, and did not receive back from him as guardian, the amounts due them, but they ought and should look to her for the payment to them of their respective shares.

There is nothing in this case to show but that the very day Mrs. Glemser was in the sheriff's office, she had in her possession the seven thousand dollars which would be due these two minor children. There is no evidence to satisfy the court of her insolvency then or now. There is nothing in this case to show but that Mrs. Glemser has already paid to this minor, who is now of age, Ella, and that she is ready also to account to Thekla when she becomes of age, for the amount of money received or paid on account of this purchase. There is no evidence in this case that the account of Marie Glemser as guardian, in the probate court has not been settled, and both of these plaintiffs been fully paid and satisfied; and coupled with the fact that this suit is brought by these two children, charging in their petition fraud, collusion and connivance on the part of their own mother, their guardian, with this building association, to defraud them of their rights in this property, together with the fact that Mrs. Glemser, the mother and the guardian of these two children, makes no defense in this action, but submits the case, so far as she is concerned, in default, and admits thereby the allegations of the petition, particularly in this case is the court led to sustain in every respect the sale made to her.

Healy & Brannan and Philip Hunter, for plaintiffs.

Drausin Wulsin and John Galvin, for the building association.

STOCKHOLDER'S LIABILITY—INTEREST.

[Hamilton Common Pleas, October Term, 1897.]

BERGER V. COMMERCIAL BANK OF CINCINNATI ET AL.

In cases in which the liability of stockholders—before suit to enforce their statutory liability is brought—is known to be equal to the face value of the stock, interest will follow from the date of the institution of the suit; but when the ascertainment of that fact must await the findings of a referee, interest should be allowed only from the date of the confirmation of his report.

HOLLISTER, J.

This suit was brought by a creditor of the Commercial Bank in behalf of all creditors, to enforce the double liability of its stockholders under the constitution and laws of Ohio. The referee found that all solvent stockholders within the jurisdiction of the court were liable in a sum equal to the par value of the stock held by each and interest from the date of the commencement of the suit. The judgment of the referee was affirmed in other respects by this court; but the question of the propriety of requiring the stockholders to pay interest from that date was, by consent of counsel, continued for further hearing.

At that hearing it was the contention of counsel for the stockholders that the proper time for the computation of interest was the day on which the decree ascertaining the amount of the liability and rendering judgment therefor, was passed. While it is admitted that the Supreme Court has held that when the aggregate of the debts is a sum greater than the maximum assessment permitted by law, interest may be collected from the commencement of the suit, *Mason v. Alexander*, 44 O. S., 318, yet, it is claimed that the facts in that case and the other reported cases in Ohio differ so materially from the facts here, that those cases do not furnish the true rule to be applied to this.

In making this contention the defendants put the proposition that in cases in which the liability of stockholders is known before the suit is brought to be equal to the face value of the stock, interest will follow from the date of the institution of the suit; but when the ascertainment of that fact must await the findings of a referee, interest should be allowed only from the date of the confirmation of his report.

It is urged that the facts in the cases in which the rule has been announced show in every instance that it was apparent before the suit was brought that the maximum liability would be the measure of the creditor's recovery. In *Mason v. Alexander*, *supra*, the stockholders contended that the liability was strictly statutory, enforceable only by the decree declaring it, and until the liability was declared, no interest could attach. The creditors claimed that the obligation was in the nature of a contract, maturing at the time of the insolvency of the corporation, and that interest began to run from maturity. The court, remarking the difficulty of the question, did not feel disposed to discuss it, adopted the decision of the superior court of Cincinnati, in *Wehrman v. Reakirt*, 1 C. S. C. R., 230, and observed that as the rule holding stockholders liable for interest from the commencement of the suit "had been generally acquiesced in as furnishing the true rule, we are not prepared to say it is not the law in this state."

The conclusion in *Wehrman v. Reakirt* was founded on *Burr v. Wilcox*, 22 N. Y., 551. In that case it was held, that where the debt

exceeds the liability of the stockholder, interest follows from the commencement of the suit, for the reason, put by Selden, J. :

"The creditor has a right to select among the stockholders the individual against whom he will proceed; and, until he has made his selection, no particular stockholder is liable, and hence no interest can be allowed for any previous time. But, from the time of the commencement of a suit for a debt exceeding the amount of the principal of the defendant's stock, I can see no reason why interest should not be allowed. It has then become a fixed liability for a specific amount, and ought, upon general principles, to carry interest."

But in Ohio the creditor has no right of selection at all; he must bring his suit in behalf of all creditors and against all stockholders, who, as against each other, have the right of contribution, *Umstead v. Buskirk*, 17 O. S., 113; *Bonewitz v. Bank*, 41 O. S., 78, and are entitled to have all parties brought in who are necessary to a final determination of the rights and liabilities of all the parties in interest, *Wheeler v. Faurot*, 37 O. S., 26. It is often necessary also, to ascertain the certain debts for which certain creditors are liable, *Harold v. Stobart*, 46 O. S., 397. A case might arise in which the creditors were few, the amounts due them undisputed or certain, and in which no doubt existed as to the exact liability and solvency of each. In such case it might be said that the liability was fixed; but in most cases the ultimate rights of the parties and the amount of the recovery cannot be ascertained except by "the methods and machinery of a court of equity."

The Supreme Court say, in *Younglove v. Lime Co.*, 49 O. S., 623: "The action is an equitable one, in which all the creditors and stockholders must be parties, and the court may withhold final judgment until the exact amount each stockholder shall pay can be ascertained, or so mould its decree as to require the several stockholders to pay their proper proportion of the liabilities remaining after the application of all the assets of the corporation toward their satisfaction, and retain control over the cause and the parties until their ultimate rights shall be determined and adjusted."

So, ordinarily, until the referee of a court of equity, or the court itself, shall have made an investigation, it may not be known whether the maximum assessment is necessary or not, and consequently, whatever the final fact may be, the liability could not have been fixed for a sum certain at the time the suit was brought. It appears from the decision in *Wehrman v. Reakirt*, *supra*, and from the record, furnished by the diligence of counsel in this case, in *Mason v. Alexander*, that a referee was appointed in each case to ascertain the liability of stockholders.

If it be true that in these cases it was not known when the suit was brought that the liability of each solvent stockholder within the jurisdiction of the court, must be a sum at least equal to the full face value of the stock, then the reason given in *Burr v. Wilcox*, *supra*, for the allowance of interest from the day the suit was brought, fails to apply to those cases. If the fact was apparent when the suits were brought, that in any event the stockholders must respond to the maximum liability, the bringing of the suit may be regarded as a demand (*Barrick v. Gifford*, 47 O. S., 180), for a fixed sum, known at the time. For a decision of the question in controversy under the state of facts last mentioned, *Burr v. Wilcox*, is directly authoritative.

Inasmuch as the Supreme Court, and the superior court of Cincinnati, respectively, based their decision on that case, we are led to believe

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that the facts before those courts showed that at the time the respective suits were instituted, it was an ascertained fact that all solvent stockholders amenable to the process of the court must be assessed in full. The petition in *Mason v. Alexander*, *supra*, definitely alleges that the indebtedness of the corporation was over \$27,000, and that the shares of stock held by stockholders aggregated \$22,000. The statement of the facts by the court in *Wehrman v. Reakirt*, *supra*, is not so clear; but if *Burr v. Wilcox*, *supra*, is authority for the decision, the ultimate fact of the amount of the liability must have been apparent at the time the suit was brought.

Assuming then, that in those cases it was known before each suit was brought, that each stockholder must be assessed in full, *Mason v. Alexander*, *supra*, does not preclude search for the true rule to be applied to a case in which, as in the case at bar, the amount of the liability cannot be fixed until the court has ascertained what it is. It is easy to understand why a debtor should pay the interest on a sum which is fixed and for which a demand has been made. If he delays, he, of course, subjects himself to the penalty of interest for withholding money justly due another.

The language of sec. 3181, Rev. Stat., requires the payment of money when it is "due and payable" or interest will be added from such time. The obligation of the stockholder is contractual in its nature, *Brown v. Hitchcock*, 36 O. S., 667; *Hawkins v. Furnace Co.*, 40 O. S., 507, 514; *Beach v. Mod. Law Cont.*, sec. 1084. The right to enforce the liability accrues either after judgment against the corporation and execution returned unsatisfied, or when the corporation is insolvent, has ceased to do business, and has made an assignment for the benefit of creditors, *Barrick v. Gifford*, 47 O. S., 180; *Morgan v. Lewis*, 46 O. S., 1; and, after the right has accrued, the creditor may proceed at once to enforce it, although, as yet, the assets of the corporation may be in process of collection and distribution, *Younglove v. Lime Co.*, 49 O. S., 668.

While in one sense the money is due when the right of action to recover it accrues, yet it cannot justly be said to be payable until the debtor knows how much is due from him. It is always within the power of a debtor to stop the running of interest by making tender of the amount due, and the law requires great exactness in the amount tendered. If he does not and cannot know the sum in which he is indebted, and yet is required to pay interest from the day the liability is sought to be charged to him, he is deprived of a legal right. It is a matter of common knowledge among lawyers that usually in an action of this nature, the case is only brought to final decree after the litigation of many questions arising upon the various rights of stockholders as among themselves and with respect to different classes of creditors, involving long and tedious delays. The assets of the corporation should be definitely ascertained, and applied *pro tanto*, and in the meantime the stockholders, perhaps willing to pay, must wait while the court retains "control over the cause and the parties until their ultimate rights shall be determined and adjusted." At the end, it may be of years, the final decree fixes the liability at its maximum; a receiver is appointed, and for the first time a demand is made for a fixed sum. The entering of the decree is the first notice the stockholder has that his liability has been fixed at double the amount of his stock, and it is only justly payable at that time.

Again, the suit is brought by one creditor for the benefit of all creditors. The plaintiff cannot give a valid discharge to a stockholder if he desired to pay his liability before judgment. The statute does not provide for any way of discharging the obligation before judgment. The stockholder, although he may be willing to pay, cannot do so until a receiver is appointed after judgment. For these reasons, therefore, the stockholders in this case should pay interest from the date of the decree confirming the referee's report.

I am not unmindful of the difficulties of the situation, nor lacking in appreciation of the language of the Supreme Court in *Mason v. Alexander*, *supra*, that the rule allowing interest from the date of filing the suit has received general acquiescence. But, as justice requires that this case should be distinguished from that, if possible, I have sought to make a distinction in order to avoid the unjust operation of a rule which, on its face, seems to apply to all cases, but when its underlying reason is sought, only applies to cases involving a certain state of facts. As applied to cases wanting in the facts which give reason to the rule, a basis for decision is laid, which, when applied to a different state of facts, fails on principle and is arbitrary and unjust in the extreme. It cannot, for a moment, be supposed that the Supreme Court intended that its mere *ipse dixit* should establish a precedent to be followed in all cases, and the subordinate courts may with propriety reject a rule not applicable to the facts in the case before them. And decisions elsewhere are not wanting to support the conclusion reached in this case.

In *Casey v. Gallia*, 94 U. S., 673, an action brought by the receiver of a national bank to enforce the double liability of stockholders, it was held that the amount due from the stockholders was conclusively fixed by the order of the comptroller of the currency, and bore interest from that date. The court say at page 677: "The sum to be paid being liquidated, and due and payable when the comptroller's order was made, it follows that the amount bears interest from the date of the order," and in *Cleveland v. Burnham* 64 Wis., 347, the court, after adopting the principle of its former decision in *Clark v. Williams*, 59 Wis., 543 that interest should be allowed even where the amount of recovery with interest exceeds the penalty of the bond, and the rule in *Brainard v. Jones*, 18 N. Y., 85, that interest is payable by a debtor for "his unjust delay in payment after his liability is ascertained and the debt is actually due from him" say at page 361: "In accordance with that principle the liability of the defendant as a stockholder, to the plaintiffs became fixed and certain, and his indebtedness to them became liquidated and due, from the date of the judgment by which it was ascertained that the assets and property of the bank had been exhausted, and the indebtedness of the plaintiffs on the balance of the judgment exceeded the amount of the defendant's stock." Accordingly interest was allowed from the date of judgment. The question was directly involved in *National Commercial Bank v. McDonnell*, 92 Ala., 387. The court reviewed *Casey v. Galli*, *Cleveland v. Burnham*, *supra*, and *Burr v. Wilcox*, *supra*, and deduced from them the principle common to all; "that the sum bears interest from the time the liability is liquidated, and a specific amount fixed, though its application may be varied by the provisions of the respective statutes." The further language of the decision is so apt as to warrant extended quotation. At page 398, it is said: "Our statute provides that all contracts, express or implied, for the payment of money, bear interest from the day such money should have been

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paid. Code, sec. 1750. Interest is allowed as compensation for withholding the principal, and follows as an incident from the time the principal is ascertained to be due. The stockholder cannot know what sum he is liable to pay, until the claims against the corporation, existing at the time of dissolution, are judicially ascertained. When this is done, and not till then, the principal becomes due and payable."

This case furnishes the true rule to be applied to the question in controversy. But if so it be that the conclusion as based on these reasons is incorrect, there is one insurmountable obstacle to the recovery of interest in this case.

Section 5060, Rev. Stat., setting forth the requisites of a petition, prescribes that it shall contain "A demand for the relief to which the party supposes himself entitled; if the recovery of money is demanded, the amount shall be stated, and if interest is claimed, the time for which interest is to be computed shall be also stated." The petition is silent as to interest, both in statement and prayer, and the plaintiff is not entitled to it until judgment.

A decree may be entered in accordance with this decision.

CONSTITUTIONAL LAW—SUNDAY BASE BALL.

[Clark Common Pleas, March 26, 1898.]

STATE OF OHIO V. JOHN M. GOODE ET AL.

Section 7032a, Rev. Stat., relating to base ball playing on Sunday, and making it an offense to play base ball on Sunday, is constitutional.

FISHER, J.

On January 12, 1898, the grand jurors, within and for the county of Clark, filed with the court the following indictment, to-wit:

"The State of Ohio, Clark county, ss.

"The court of common pleas, Clark county, Ohio, of the term of January, in the year of our Lord one thousand eight hundred and ninety-eight.

"The jurors of the grand jury of the state of Ohio, within and for the body of the county of Clark, impaneled, sworn and charged to inquire of crimes and offenses committed within said county of Clark, in the name and by the authority of the state of Ohio, on their oaths do find and present, that John M. Goode and Robert S. Black, late of said county, on or about the eleventh day of July, in the year of our Lord, one thousand eight hundred and ninety-seven, at the county of Clark aforesaid, wilfully, knowingly and unlawfully, did resist in the execution of his office, one John O. Sheets and one George H. Bailey, they each being then and there an officer, to-wit: a deputy sheriff in and for the county of Clark, in the state of Ohio, by unlawfully threatening in a menacing manner, assaulting and beating him, the said John O. Sheets, and him the said George H. Bailey, and by violently preventing him, the said John O. Sheets, and him the said George H. Bailey, from arresting, detaining and taking into their custody the following persons, viz: one Martin, one Ashenbaugh, one Brady, one Hoffmeister, one Pyles, one Cavanaugh, one Whistler, one Stevick, one Coggsell, one Cooper, one

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Speen, one Torreyson, one Rickert, one Patterson, one Zinran, one Lyon, one Berry, and one Jordan, the Christian names of the aforesaid persons being to the grand jurors unknown, and did then and there further resist him, the said John O. Sheets, and him, the said George H. Bailey, by causing and inciting a large number of persons, the names of said persons being to the grand jurors unknown, to riotously assemble and then and there to unlawfully and riotously to congregate and to surround him, the said John O. Sheets, and him, the said George H. Bailey, and to make divers movements and great preparations to forcibly assault, beat, bruise, wound and kill him, the said John O. Sheets and him, the said George H. Bailey, when he, the said John O. Sheets and George H. Bailey, were then and there engaged in arresting and detaining and in attempting to arrest and detain, the said Martin, Ashenbaugh, Brady, Hoffmeister, Pyles, Cavanaugh, Whistler, Stevick, Coggsell, Cooper, Speen, Torreyson, Rickert, Patterson, Zinran, Lyon, Berry and Jordan, and when he, the said John O. Sheets and he, the said George H. Bailey, were then and there attempting to execute a certain lawful warrant for the arrest of the said Martin, Ashenbaugh, Brady, Hoffmeister, Pyles, Cavanaugh, Whistler, Stevick, Coggsell, Cooper, Speen, Torreyson, Rickert, Patterson, Zinran, Lyon, Berry and Jordan, he, the said John O. Sheets, and he the said George H. Bailey, being then and there in the due execution of their office, and being then and there duly authorized and qualified according to law as such deputy sheriffs, as aforesaid, and in obedience to the command of said lawful warrant, duly issued to the sheriff of Clark county, Ohio, and delivered to them as deputy sheriffs as aforesaid, by H. D. Brydon, then and there a duly elected, qualified and acting justice of the peace, in and for the township of Springfield, and county of Clark, in the state of Ohio, upon a certain affidavit duly signed and sworn to by one Charles S. Kay, on the eleventh day of July, A. D. 1897, before said H. D. Brydon, as such justice of the peace, and then and there filed in the office of said justice of the peace, charging the said Martin, Ashenbaugh, Brady, Hoffmeister, Pyles, Cavanaugh, Whistler, Stevick, Coggsell, Cooper, Speen, Torreyson, Rickert, Patterson, Zinran, Lyon, Berry and Jordan, on the eleventh day of July, A. D. 1897, at the county of Clark, in the state of Ohio, with unlawfully and knowingly, on said eleventh day of July, A. D. 1897, which day being then and there the first day of the week, commonly called Sunday, of participating in, and in exhibiting to the public, with a charge for admittance, in a certain park and grounds located in the city, of Springfield, said county of Clark, base ball, contrary to the form of the statute in such case made and provided, commanding the sheriff of said county of Clark, to take the said Martin, Ashenbaugh, Brady, Hoffmeister, Pyles, Cavanaugh, Whistler, Stevick, Coggsell, Cooper, Speen, Torreyson, Rickert, Patterson, Zinran, Lyon, Berry and Jordan, if they be found in said county, or if they shall have fled, that he pursue after them into any other county in the state, and then take and safely keep so that he have their bodies forthwith before said H. D. Brydon, as such justice of the peace aforesaid, or some other justice of the said county of Clark, to answer the said complaint as aforesaid, and be further dealt with according to law, which said warrant the said H. D. Brydon, as such justice of the peace aforesaid, had lawful authority to issue as aforesaid, and the said John O. Sheets, and the said George H. Bailey, being then and there duly authorized and qualified deputy sheriffs as aforesaid, was then and there on said

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day and year first aforesaid, in duty bound by law as such deputy sheriffs as aforesaid, to arrest and detain the said Martin, Ashenbaugh, Brady, Hoffmeister, Pyles, Cavanaugh, Whistler, Stevick, Coggsell, Cooper, Speen, Torreyson, Rickert, Patterson, Zinran, Lyon, Berry and Jordan, and had lawful authority to serve and execute said warrant so delivered to them as aforesaid, and was then and there attempting to arrest and detain the said Martin, Ashenbaugh, Brady, Hoffmeister, Pyles, Cavanaugh, Whistler, Stevick, Coggsell, Cooper, Speen, Torreyson, Rickert, Patterson, Zinran, Lyon, Berry and Jordan, by virtue said warrant aforesaid, and to execute the same, all of which he, the said John M. Goode, and he, the said Robert S. Black, then and there well knew, and the said John M. Goode and the said Robert S. Black, well knowing, that the said John O. Sheets and the said George H. Bailey, were then and there deputy sheriffs, duly authorized and qualified, and had lawful authority as aforesaid, by resisting him, the said George H. Bailey, in manner and form as aforesaid, prevented him, the said John O. Sheets and him, the said George H. Bailey, as such deputy sheriffs as aforesaid, from arresting and detaining the said Martin, Ashenbaugh, Brady, Hoffmeister, Pyles, Cavanaugh, Whistler, Stevick, Coggsell, Cooper, Speen, Torreyson, Rickert, Patterson, Zinran, Lyon, Berry and Jordan, and from executing said warrant so issued and delivered as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio:

“HORACE W. STAFFORD,

“Prosecuting Attorney of Clark Co., O.”

To this indictment a general demurrer has been filed by counsel for the defendants, but it is conceded that if the law for the enforcement of which the affidavit and warrant, set up in the indictment were made, is constitutional, then that the indictment in all respects is sufficient, and properly charges an offense.

It is claimed by counsel for the defense, that sec. 7032a, Rev. Stat., in so far as it attempts to make it an offense to play baseball on Sunday, is unconstitutional, and if unconstitutional, the statute in that particular is void, and if void, the affidavit and warrant charged no offense against the law, and charging no offense, the officers were without authority in trying to make an arrest under the warrant, and the defendants had a right to resist the officers in their endeavors to serve the warrant.

In support of this claim, the court is referred to *State v. Powell*, 7 Ohio Dec., 164, decided by his Honor Judge Ong, of Cleveland, and the case decided by Judge Swarts, of the police court of Columbus, and also the constitution itself, sec. 7, Bill of Rights.

I find myself unable to agree with the learned courts expressing opinions upon this question in the cases cited.

The validity of the Sunday laws has been repeatedly passed upon and in clear and vigorous language sustained by our Supreme Court, not on the ground that the day is a holy day, and by Christians observed as a day for religious thought and worship, but on the ground that it is the day set by the state for rest, quiet and peace, for the welfare, health and happiness of all people, Jew, Christian and Unbeliever.

Cincinnati v. Rice, 15 O., 225; *Sellers v. Dugan*, 18 O., 489; *Bloom v. Richards*, 2 O. S., 387; *McGatrick v. Nassau*, 4 O. S., 566.

And I have found no intimation in any of the subsequent decisions of our Supreme Court modifying the law as laid down in *Bloom v. Richards supra*. Judge Thurman, in writing the unanimous opinion of the court in that case, says: "We are then to regard the statute under consideration as a mere municipal or police regulation, whose validity is neither strengthened nor weakened by the fact that the day of rest it enjoins is the Sabbath day. Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regularly recurring intervals, are too obvious to be controverted. It is within the constitutional competency of the general assembly to require the cessation of labor and to name the day of rest." This doctrine has been asserted and made the rule of action in every state in the Union, except notably the state of California, in *Ex parte Newman*, 9 Cal., 502, which was disapproved in *Ex parte Andrews*, 18 Cal., 679.

Had the learned and patriotic gentlemen who penned sec. 7, of the Bill of Rights, understood when they did so, they were giving a death blow to, and wiping out the Sunday laws, I apprehend they would have added a clause of construction, as a lamp to guide the "present day destructionists." In exercising the power to name a day of rest, the legislature could have named any other day in the week, and required its observance. That it named Sunday is not strange; in fact being a Christian people, it would have been passing strange indeed, had any other day than Sunday been named.

When the Pilgrim Fathers landed at Plymouth Rock, they brought with them not only the spirit of religious liberty—the right to worship Almighty God according to the dictates of one's own conscience—but they brought also, as well, the Christian Sabbath, and the one became as much a part of the organic or fundamental law of the land, as the other, and from the very beginning of the establishment of the colonial governments down to the present time, the right to regulate the observance of the one, as a fixed period for rest and cessation from labor, has been as broadly recognized, as has been the right of absolute freedom of religious worship.

While the right to enjoy absolute religious liberty and the right to appoint a day of rest and regulate its observance have gone hand in hand from the very formation of the government, it has never been questioned that the broadest enforcement of the one in any way conflicts with, or hinders the broadest enjoyment of the other, because the day fixed for rest is the Sabbath Day.

The one has to do with the spiritual welfare of man, over which the state has no control, and with which it has no right to interfere; the other has to do with the physical welfare of man, as a member of society, in which the state is vitally interested, and over which the state has control.

"Upon no subject," says Justice Field, in *Ex parte Newman*, 9 Cal., 502–520–529, "is there such a concurrence of opinion among philosophers, moralists and statesmen of all nations, as on the necessity of periodical cessation from labor. One day in seven is the rule, founded in experience and sustained by science."

The selection of a day therefore, on which it is required man shall cease from labor, is by law to sanction a rule of conduct which the entire civilized world recognizes as essential to the physical and moral well-being of society, and the uniform selection of Sunday as that day,

is but the recognition of the sentiment and will of the entire people, from the formation of the government.

It being admitted that the state has power to provide by legislation, for a day of rest, the question of selection is one of expediency, and Sunday, being in law like any other day of the week, the statute, fixing Sunday as the day for rest, relaxation, peace and quiet, would not be vitiated or weakened because the day selected is the day which the Christian observes as his day for religious thought and worship.

Bloom v. Richards, 2 O. S., 389.

In *Hennington v. State of Georgia*, 90 Ga., 396, the court decided, under a statute similar to our own, that a statute making it unlawful to run a train on Sunday is not unconstitutional. This case was taken on error to the Supreme Court of the United States, and the court of Georgia sustained, and the law held valid on the same grounds put by that court. The case was decided in May, 1896, and reported in 163 U. S., 299. Judge Harlan, in deciding the case, says: "As the contention is that the court erred in not adjudging the statute in question to be unconstitutional, it is appropriate that the grounds upon which it proceeded, should fully appear in this opinion," and quotes as follows:

"With respect to the selection of a particular day in each week, which has been set apart by our statute as the day of rest for the people, religious views and feelings may have had a controlling influence, we doubt not they did have; and it is probable that the same views and feelings had a very powerful influence in dictating the policy of setting apart any day whatever as a day of enforced rest. But neither of these considerations is destructive of the police nature and character of the statute. If good and sufficient police reasons underlie it, and substantial police purposes are involved in its provisions, these reasons and purposes constitute its civil and legal justification, whether they were or not the direct and immediate motives which induced its passage, and have for so long a time kept it in force.

"Courts are not concerned with the mere beliefs and sentiments of legislators, or with the motives which influenced them in enacting laws which are within legislative competency. That which is properly made a civil duty by the statute, is none the less so because it is also a real or supposed religious obligation; nor is the statute vitiated or in any wise weakened by the chance, or even the certainty, that in passing it the legislative mind was swayed by the religious, rather than by the civil aspect of the measure. Doubtless, it is a religious duty to pay debts, but no one supposes that this is any obstacle to its being exacted as a civil duty. With few exceptions, the same may be said of the whole catalogue of duties specified in the ten commandments. Those of them which are purely and exclusively religious in their nature, cannot be made civil duties; but all the rest of them may be, in so far as they involve conduct as distinguished from mere operations of mind or states of the affections. Opinions may differ, and they really do differ, as to whether abstaining from labor on Sunday is a religious duty; but whether it is or not, it is certain that the legislature of Georgia had prescribed it as a civil duty. The statute can fairly and rationally be treated as a legitimate police regulation, and thus treated it as a valid law. There is a wide difference between keeping a day holy as a religious observance, and merely forbearing to labor on that day in one's ordinary vocation or business pursuit."

The same doctrine is announced in *Specht v. Commonwealth*, 8 Pa. St., 312; *John W. Judifind v. The State of Maryland*, 22 L. R. A., 721; *Froticsteine v. Mobile*, 4 Ala., 725; *Commonwealth v. Has*, 122 Mass., 40; *The People of N. Y. v. Havnor*, 149 N. Y., 195.

In the last named case, the court say: "While questions have been raised as to noiseless and inoffensive occupations that can be carried on by one individual without requiring the services of others, as well as to persons who observe the seventh instead of the first day of the week, still the rule is believed to be general throughout the Union, although not generally enforced, that the ordinary business of life, shall be suspended on Sunday, in order that thereby the physical and moral well-being of the people may be advanced.

"The inconvenience to some is not regarded as an argument against the constitutionality of the statute, as that is an incident to all general laws. Sunday statutes have been sustained as constitutional almost without exception."

In *New York v. Moses*, 140 N. Y., 265, it is held, that the provision of the penal code, (paragraph 265), prohibiting fishing on Sunday, "is absolute and forbids fishing on that day anywhere in the state and under all circumstances." Earl, Judge, says, "The Christian Sabbath is one of the civil institutions of the state, and that the legislature for the purpose of promoting the moral and physical well-being of the people, and the peace, quiet and good order of society, has authority to regulate its observance, and prevent desecration by any appropriate legislation, is unquestioned." To the same effect is the case of *Lindenmuller v. The People*, 35 Barb., p. 548.

In a late case, *Norfolk & W. R. R. Co. v. Virginia*, 34 L. R. A., p. 105, it is held that the state laws prohibiting the running of railway trains on Sunday, when enacted in good faith for the preservation of the health and morals of the people, without discrimination against interstate or foreign commerce, was not in conflict with the constitution of the United States. The case is well considered, and worthy of attention.

In *State v. O'Rourke et al.*, 35 Neb., 615, under a statute providing that any person of fourteen years of age or upwards, who shall on Sunday be engaged in "sporting," the court held the law constitutional that playing base ball on Sunday came within the definition of sporting. Our own Supreme Court, in equally as clear and vigorous language has announced the same doctrine.

McGatrich v. Mason, 4 O. S., 566; *Bloom v. Richards*, 2 O. S., 387.

In *Bloom v. Richards*, *supra*, it is nowhere intimated that the legislature has not the power to determine what acts are injurious to the well-being and physical welfare of the people—but on the contrary, the court recognizes the power to say what on that day shall be unlawful, is with the legislature, the only limitation being that it must be for the general welfare, that the purpose to be reached be a public purpose, and that the law in fact is a police law.

Keeping in mind that it is a police regulation, the power is not limited to things, the doing of which is *per se* immoral, or in the nature of a nuisance, but extends to everything temporal, which the legislature, acting in good faith, believes would interfere with the preservation of the day of rest, the peace, quiet and well being of the people, the health, and morals and general good. It is not immoral to hunt or fish on Labor day, yet no one will claim that under our statute it is not unlaw-

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ful to do either on Sunday, however private and secluded, or that such statute infringes upon sec. 7 of the Bill of Rights.

It is not within the power of the court to say whether the thing prescribed is injurious to the welfare or not—the legislature having declared it so, it must be so accepted till repealed—and this power rests with the people, and not with the judge.

The court has no right to assume that the legislature prescribed an act and made it an offense to be done on Sunday, simply because it was Sunday—it is the business of the courts to assume that the legislature acted lawfully and in good faith, and that the act prescribed was prescribed because, if heretofore lawful, in the opinion of the legislature to permit the continuance on the day of rest, would destroy the object for which it was set apart.

Nor does the validity of the statute depend upon whether the thing prohibited is a noisy or quiet pursuit, carried on in a private manner,—absolute prohibition means absolute prohibition, and must be so enforced. Nor is it essential to the validity of the act that those who conscientiously observe the seventh day of the week as their Sabbath should be excepted from its operation. Such exceptions are frequently made, but when not made, the failure to make them in no way affects the validity of the statute, and those who believe in the seventh day as the Sabbath must suffer the inconvenience for the general good. All the authorities agree upon this point and the cases above cited, including our own court, are undoubted authorities in its support.

The rule announced by the Supreme Court of the United States and all state courts, is, “that when a statute has substantial relation to the public health, the public morals, or the public safety, and no rights secured by fundamental law is invaded, it should be given effect, and this even though the religious views and feelings of those who enacted the law were a controlling influence.”

I think secs. 7032–7032a, and 7033, have substantial relation to the public health, the public morals, and the public safety, and interfere with no rights secured by fundamental law.

If a law which, in essential respects, betters for all the people the conditions, sanitary, social, moral, and individual, under which their daily life is carried on, and which contributes to insure for each, even against his own will, his minimum allowance of rest, peace and quiet, cannot be classed as a police regulation, it would be difficult, it seems to me, to imagine any law that could.

The demurrer is therefore overruled.

Horace W. Stafford, and O. F. Serviss, for state.

George C. Rawlins, and Bowman & Bowman, for defendants.

ADMINISTRATORS—PERPETUAL LEASEHOLD.

[Hamilton Common Pleas.]

JULIA B. GAUSEN ET AL. V. F. J. MOORMANN.

An administrator of the assignee of a perpetual lease, is not personally liable to the owner of the fee, for the payment of rents and taxes which were covenanted for in the lease, for the reason that the estate divested by the statutes of its chattel qualities, was no longer an asset in the hands of such administrator.

The plaintiffs are the owners of the fee to the property known as the Germania Hotel, which is under a perpetual lease containing cove-

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nants to pay rents and taxes, binding upon the lessee, his heirs, executors, administrators and assigns. This lease was assigned to one Wm. Pape, who carried on the hotel business until his death, when he was succeeded in the business by his widow, as administratrix, and subsequently, under authority of the probate court, by F. J. Moormann, the present defendant, as administrator *de bonis non*, who carried on the hotel business for a period of seven months, during which time rents accrued to the amount of \$1,225 and \$305 taxes. Suit was brought by the owners of the fee against Moormann, as administrator *de bonis non*, and Moormann, individually.

The question thus presented was as to the individual liability of the administrator of a deceased assignee of a perpetual leasehold containing covenants to pay rents and taxes.

HOLLISTER, J.

There was no personal liability on the part of the defendant to the plaintiffs. This, for the reason that the estate, divested by the statutes of its chattel qualities was no longer an asset in the hands of the administrator. The title was in the heir of the deceased, William Pape, subject to the dower rights of his widow, and from the heir the administrator could not take it except for the sole purpose of selling it in the manner prescribed by law to pay the decedent's debts; and he could take the title for this purpose, not as one having any interest in it, but as a convenient instrument or conduit by whom and through whom the title could be passed from the heir to the purchaser. In this view of the matter the liability to the plaintiffs for rent and taxes attaches to the dowress and the heir as assignees of the lease by operation of law; and for rents collected by the defendant from portions of the property not used for hotel purposes, he is liable to the heir and dowress, as their agent, or, if such agency is disaffirmed by the minor, then as their tenant.

M. F. Galvin and E. P. Bradstreet, for plaintiffs.

Wm. L. Avery and F. J. Moormann, *contra*.

Affirmed by circuit court.

JUDGMENT BY CONFESSION.

[Hamilton Common Pleas.]

BARNEY S. McCLURE ET AL. V. JOHN D. BOWLES.

1. Courts have no favorable regard for judgments by confession obtained—as in this case—upon the last day of a term and without notice to the judgment debtor.
2. The very taking of a judgment of confession at such a time, when the court is deprived of supervisory control over its journal, is enough to justify at least a suspicion that the holder of the note is to some degree unwilling to meet the maker upon issue fairly joined.
3. The phrase, "any attorney" as used in a power of attorney to confess judgment, fails to identify any person at all as clothed with authority. While it is sufficient to indicate a purpose to grant authority, the court is unable to understand how contemplation can be regarded as consummation. But the question has been foreclosed by courts of last resort, and it must be held that this indefiniteness does not fail to confer jurisdiction and thus render the judgment void.

McClure et al. v. Bowles.

4. The fact that the note authorized judgment to be confessed in "any court of record in the state of Ohio or elsewhere" does not under the judgment void for uncertainty, inasmuch as the judgment was taken in the county where the note was made and the maker resides.
5. A power of attorney to confess judgment, attached to a note, and forming a part of the same instrument, does not destroy the negotiability of the note. Such power of attorney is not negotiable, and when the note is transferred, becomes invalid and inoperative.
6. Whether the warrant of attorney can be executed for the benefit of a holder of the note other than the payee, must depend upon the language of the warrant itself. But an authority given by warrant of attorney to confess a judgment against the maker of the note, must be clear and explicit, and strictly pursued, and any supposed omissions of the parties can not be supplied.
7. A note endorsed in blank passes by delivery and not by assignment, the same as if drawn payable to "bearer."
8. In the case at bar, judgment was confessed, not in favor of the payee, but to a stranger to the note, which had been endorsed by the payee in blank. A note thus endorsed passes from hand to hand by delivery and not by assignment. The holder, therefore, was not an "assign" of the payee and the judgment in his favor was not authorized, and if a defense to the note is shown such judgment will be vacated.

WRIGHT, J.

The defendant, John D. Bowles, at a prior term obtained judgment against the plaintiffs upon a promissory note, a copy whereof is thus:

"\$400.00. Preston, O., March 16, 1893.

"Eighteen months after date we promise to pay to the order of W. R. Cochran, Jr., four hundred dollars, at Citizen's Bank, Harrison, Ohio, with—per cent. interest. And we hereby authorize and empower any attorney at law, at any time after this obligation becomes due, to appear for us before any court of record in the state of Ohio, or elsewhere, and waive the issuing and service of process and confess judgment against us, in favor of the payee above named or assigns, for the sum due hereon, interests and costs, and thereupon to release all errors and waive all right and benefit of a second trial or appeal in our behalf.

"(Signed)

BARNEY S. McCLURE,
"WM. W. McCLURE."

Judgment was confessed by an attorney of this bar. It is claimed by plaintiff that the judgment is void for want of jurisdiction, and ought to be vacated. At the out-set I am bound to say, that courts have no favorable regard for judgments by confession obtained as this judgment was upon the last day of a term and without notice to the judgment debtor. With the close of the term the court was deprived of that supervisory control over its journal which would ordinarily enable it as a matter of course to vacate the judgment and permit the making of a legitimate defense if one were shown; the very taking of judgment by confession at such times is enough to justify at least a suspicion that the holder of the note is, to some degree, unwilling to meet the maker upon issue fairly joined. If there be no valid defense against the notes, the holder must ultimately prevail and will have lost nothing saving a little time by vacating the judgment; while, upon the other hand, if there be a valid defense the holder ought not in conscience, to prevail; and the vacating of the judgment will but accomplish justice and establish right. Therefore, in so far as questions here presented may be doubtful, they

ought to be resolved in favor of the plaintiff in so far as may right-fully be done.

Primarily, it is contended, that the power of attorney undertaken to be conferred is void for uncertainty; that the phrase "any attorney at law," is sufficient to point out any individual as clothed with authority; is insufficient to designate a donee of the authority undertaken to be conferred. It seems to me, that were this question presented now for the first time, I would find it necessary to declare the point well taken.

The phrase "any attorney" indicates no particular attorney as distinguished from all other attorneys, and therefore fails to identify any person at all as the one clothed with authority; if language be so indefinite as that it identifies no person as the one undertaken to be clothed with authority, so indefinite as that it fails to identify him who shall exercise authority, as that it fails to point out a donee, it is to me impossible to understand how that same language is capable of carrying authority to any one at all; while undoubtedly sufficient to indicate a purpose to grant authority, yet I question that it is any more; a purpose is one thing; execution of it is another thing; contemplation is not the same as consummation; if it were a grant of anything save of a power, and the grant were to "any attorney." I take it that no one would be heard to contend that one attorney or another, took under that grant any right in, or any authority over the subject of the grant. A grant to "any attorney" is a grant to no one any more than to another one, and hence is not of such definiteness as to constitute any grant at all.

But I am under the necessity of concluding that this question must be held to be foreclosed by the custom of courts of last resort in their dealings with such cases. I am not able to ignore that very many cases of cognovits have arisen wherein the words "any attorney at law" appear to have been used, and wherein the courts have without question assumed the phraseology to be sufficient.

Tell v. Yost, 13 L. R. An., 796; Mikeska v. Blum., 63 Texas, 44; Keith v. Kellogg, 97 Ill., 150; Hall v. Jones, 32 Ill., 38; Poppers v. Mayer, 33 Ills. App., 19; Kuehne v. Goit, 54 Ill. App., 596; Bank of Athens v. Garland et al., 67 N. W. Rep., 559; Cooper v. Shavee, 101 Pa. St., 547; Marsden v. Soper, 11 O. S., 503; Spence v. Emerine, 46 O. S., 433; Ream v. The Bank, 1 Ohio Circ. Dec., 351; Cushman v. Welsh, 19 O. S., 536; Davis v. Parker, 8 C. C., 107.

I must therefore resolve the first contention against the plaintiffs.

Secondly, it is urged that the phrase "any court of record in the state of Ohio or elsewhere," is void for the like reason, that is to say, for uncertainty; upon this point it is to be remembered that judgment was obtained, not "elsewhere," but within the state of Ohio, within the county of plaintiffs' residence, and within the county where the note was made; so that the question is upon the sufficiency of the language to authorize judgment in this particular court of Ohio, and is not upon the point of whether a court "elsewhere" could have acquired jurisdiction. It must needs be said that the parties contemplated, at least, a confession of judgment in the court of jurisdiction over the place of the maker's residence, when that place is co-incident with the place where the note was made that the makers so intended must be presumed.

Upon this proposition the books seem to point out that though the language employed to designate the court were even more general than that at bar, yet judgment would be good in some cases; that is to say, if a note authorized judgment in "any court of record" without specific

mention of one state or another, I take it that judgment without the state wherein the note was given would be void: upon the ground that the parties must be said to have had in mind only the courts of that particular state wherein they happened to be; but that a judgment obtained within that state would be held a good judgment, for the same reason.

The case at bar in these respects presents distinctions from some cited cases and upon vital points; notably, in that of *Carein v. Taylor*, 7 Lea (Tenn.), 666. It appears that the note was made in Pennsylvania, the maker resided in Tennessee, and judgment was confessed in the state of Ohio. I must say that at bar, the language employed is sufficient to confer jurisdiction upon the court here. *Bank v. Garland*, 67 N. W. Rep., 559. But a contemplation of the terms of the power, taken together with the endorsement upon the note, brings to light the presence of a question more serious than those suggested and I shall now state it; the power is this: to "confess judgment against us in favor of the payee above named or assigns;" now judgment was confessed not in favor of the payee, but in favor of John D. Bowles, who is a stranger to the note, and one whose name nowhere appears thereon, either as endorser or otherwise. There is a single endorsement set down upon the note, that of the payee "W. R. Cochran, Jr.," an endorsement in blank; so that the question is, is John D. Bowles the "assign" of the original payee. In the consideration of this question it should be held in mind that "A warrant of attorney to confess judgment must be strictly construed, and the authority thereby conferred can not be exercised beyond the limits expressed in the instrument." *Cushman v. Welsh*, 19 O. S., 536; *Spence v. Emerine*, 46 O. S., 433.

"And also that a power of attorney to confess judgment, attached to a note, and forming a part of the same instrument, does not destroy the negotiability of the note. Such power of attorney is not negotiable, and when the note is transferred, becomes invalid and inoperative." *Osborn v. Hawley*, 19 O., 130.

The report of this latter case fails to set forth the wording of the particular power then before the court, yet, nevertheless, it is decisive that powers to confess in favor of the payee are not negotiable; that is to say, cannot be exercised generally in favor of whomsoever may become holder of the note; cannot be exercised in favor of any, save in favor of those whom the maker has seen fit to designate; cannot be exercised in favor of another than the payee, unless that other be by the maker designated in appropriate terms.

"Whether the warrant of attorney can be executed for the benefit of a holder of the note other than the payee, must depend upon the language of the warrant itself. But it is an established principle, that an authority given by warrant of attorney to confess a judgment against the maker of the note, must be clear and explicit, and strictly pursued, and we cannot supply any supposed omissions of the parties." *Spence v. Emerine*, 46 O. S., 439.

It is strongly intimated in *Marsden v. Soper*, 11 O. S., 503-5, that a power to confess judgment in favor of "any holder" is not legally operative to authorize confession of judgment in favor of an endorser of the note; but however this may be, it is clear enough that the mere fact that John D. Bowles may happen to have become the holder of the note at bar, does not alone authorize confession of judgment in his favor; for the power is not given to confess in favor of "holders;" the language of the warrant is, "assigns." Does the term "assigns" include John D.

Bowles the stranger to the note, one whose name nowhere appears thereon? Nobody can say from the writing itself, but that half a score of persons have held and owned this note, between the payee, W. R. Cochran, Jr., and John D. Bowles; if this turn out to be the case, shall it be said that each and all are "assigns" of the original payee?

The question depends upon whether or no a note endorsed in blank, passes from hand to hand by assignment, or by delivery. I take it to be an established principle that a note endorsed in blank passes by delivery and not by assignment, the same as if drawn payable to "bearer."

In *Bullard v. Bell*, 1 Mason, 252, it was said by Judge Story:

"A note payable to bearer, is often said to be assignable by delivery; but in correct language there is no assignment in the case. It passes by mere delivery; and the holder never makes any title, by or through any assignment but claims merely as bearer."

Cooper v. Town of Thompson, 13 Blatchf., 434, 437; *Thompson v. Perrine*, 106 U. S., 593, and this language may with full force be applied at bar; the note being endorsed in blank, passed by mere delivery, and there is no assignment in the case; John D. Bowles can make no title by, or through any assignment but claims merely as holder. So that he is no "assign" of the payee and therefore the judgment in his favor was unauthorized. If, in accordance with statutory requirement, a defense to the notes is shown, the judgment will be vacated.

CORPORATIONS—RECEIVERS—MECHANIC'S LIENS.

[Lucas Common Pleas, July 13, 1895.]

ANDREWS & HITCHCOCK IRON CO. V. ISAAC D. SMEAD HEATING & VENTILATING CO.

1. The assignees of contracts for the erection of heating appliances will be postponed as to their claim upon the funds arising from the contract to the holders of any mechanic's liens, which may have been acquired, either upon the property or upon the fund arising from the contract.
2. Where two corporations are insolvent and both in the hands of receivers, one of whom is asserting a mechanic's lien against the other; the receiver asserting such claim stands in exactly the same position, having the same rights and subject to the same limitations that the company would have had, were it solvent and in court presenting its claim, and the other corporation were also solvent and in court.
3. Where the money in dispute is in the hands of the receivers; the receivers are simply the hands of the court, and the money is in court ready for distribution.
4. Where the question is whether one corporation is in a position to assert and perfect a mechanic's lien against another corporation, the fact that there are different departments in the business is not conclusive; but where there is substantially one corporation, or where there may be two corporations doing substantially one thing, carrying out substantially one set of contracts, one of them attending to the financial part, taking the contracts and the other to the manufacturing, although they could not be partners, still they would be the two hands by which the corporation was doing the one work: the one being at all times in the control of the other; and, therefore, there is no principle upon which one can assert a mechanic's lien against the other. In such case no principle of marshaling of liens applies.

PRATT, J.

I have examined the mass of pleadings in this case, and the entries—what has been done in it, etc., but I shall not undertake to go through

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them, or state anything in reference to them except to draw attention to the actual points here in dispute.

There are a number of parties—and I do not need to stop and give their names or designations—who claim to hold contracts made by the heating and ventilating company with various and sundry schoolhouse bodies, either public or private; a large number of them in Ohio, some in Indiana, and Michigan and Kansas, and the questions which arise are:

1. As to the rights of these assignees; and,
2. Whether Smith, the receiver appointed for the foundry company, has valid mechanics liens by which he can reach whatever proceeds of these various and sundry contracts are now in the hands of the receiver of the heating and ventilating company?

So far as the rights of the parties holding these assignments of contracts are concerned, there seems to me to be no substantial doubt as to what the rights of the holders of these contracts are. No question is made as to the validity, as between the heating and ventilating company and these several school boards, of any of these several contracts; they are recognized by the school boards and recognized by everybody, and no question is made as to their validity as between the parties to these contracts, and no question is made, so far as the facts are concerned, as to the assignment of these contracts, or any of them, to any of the several parties who are now here seeking to hold the proceeds of those contracts. There is no contest in the facts as to the consideration paid by these assignees for these contracts, or either of them. If there is any dispute whatever as to the amounts which are due to these assignees, the court is not required to settle any of these matters of figures, but only to determine the questions which might arise as to how the computation is to be made. There being no dispute that this court is required to settle now, as to the facts of these contracts, there is no chance for dispute as to the law resulting from these facts in regard to these contracts.

These assignees are not the holders of negotiable paper. Quite a long argument was made, and briefs presented, to show that they are not the holders of negotiable paper. It seems to me that there is very little occasion for making any argument upon a subject which is so plain.

Again; by their assignments they took only the rights which the assignor had to give. They stand in the shoes of the assignor, so far as their rights are concerned.

They can only take what would be due on the contracts upon the completion of the work and upon the performance of the conditions of these several contracts either by or on behalf of the ventilating company, the ventilating company being their assignor and they its assignees.

Now, as the result, it appears, without any chance for question or dispute, as it seems to me, that if any material man, subcontractor, or laborer, could, under the laws of any of these states where the contract was to be performed, procure a lien upon the property or upon the fund arising from the contract, such lien would be prior to the claim of the assignee. As to this branch of the case, I do not see any chance really for discussion.

The second question, in my judgment, is the one upon which the whole contest here turns:

Are the liens claimed by Smith as receiver of the foundry company, valid, and is he thereby entitled to the funds in dispute now in the hands of the receiver of the ventilating company?

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This has been presented to me in detail as to each of these several contracts and the statutes of the several states of Kansas, Indiana, Michigan and Ohio have all been cited and discussed by counsel pro and con, and I have been furnished with full briefs by attorneys upon the subject, and I will now give my views upon that as best I can.

Counsel for Smith, receiver, in a lengthy brief filed, makes this statement as to the position of Smith the receiver. They say: "Judge Harmon held, when another branch of the Smead case was argued, that Smith, receiver, stepped into the shoes of the foundry company, and for all purposes in carrying on its business, was the foundry company. Judge Hammond, of the United States court, in the case of *VanDusen v. Pierce*, Recr. held to the same effect in the trial of that case during the past few days. Such being the case, Smith, receiver, had the same time in which to file liens as the foundry company itself would have had, had no receiver ever been appointed."

I have not the slightest doubt of the correctness of this statement of law as given by either of these judges and adopted by counsel. In other words, Mr. Smith comes here and stands here now exactly in the same position, having the same rights and subject to the same limitations that the company would have had if the company were solvent and were here itself and presenting its claims and if the ventilating company were solvent and were here presenting its claims. Of course this is not leaving out of view the fact that these matters have been adjusted so that the money here in dispute is in the hands of one of these receivers. These receivers are simply the hands of the court and the money is here ready for distribution, and Mr. Smith, in this matter is the foundry company, neither more nor less.

The real question, then is, were the relations between these two corporations—the heating and ventilating company and the foundry company—such and was the business by them done in such manner that the foundry company itself could have perfected these several liens, or either of them, so as to have acquired priority over these assignees, or over the ventilating company if there had been no assignment, the assignee standing in the shoes of the ventilating company and Smith standing in the shoes of the foundry company?

Counsel for Smith, receiver, claim that here were two independent companies, with different stockholders and different creditors, and that neither the acts or declarations of Mr. Smead—who was president of both companies during the greater portion of the time of these transactions—as president of the foundry company, or even the acts of its board of directors, would bind or estop the creditors of the foundry company.

In answer to this, on behalf of these assignees it is said, in the brief furnished by counsel: "The business of these two companies was carried on substantially as one. The ventilating company was the contracting and financial party, and the foundry company was the manufacturing party. The business would not have been carried on any differently had there been but one company with two departments. Smead was the president of both, owned the majority of stock of the foundry company, absolutely controlled and managed the foundry for years with the knowledge and consent of all the remaining stockholders. The accounts between the companies, it is true, were kept for convenience; but they were kept as a continuous running account. The business was transacted and the accounts kept in a way utterly inconsistent with the idea of filing or obtaining liens upon any particular contract or piece of work."

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The matter is before me, to decide upon the evidence produced here as to which of these two utterly diametrically opposite claims is true, or is sustained, rather, by the evidence in the case. This question lies, in my judgment, at the base of what is to be decided here, and we cannot get around it, nor get over it nor dodge it, and so far as the decision is concerned it is only a conclusion of fact to be determined from the testimony, and there is but little help to be obtained from the decisions which have been cited to me, or any that I know anything about. The case that throws the most light upon the subject, although it does not come very near being a parallel to this case, is a case which was cited upon the argument, from the *Iron Co. v. Murray*, 38 O. S., 323; and the part which I think bears upon the question which I am here to decide is found in the opinion of McIlvaine, Judge, on page 327. I will read a couple of paragraphs—not all of being so very pertinent, but part of it, it seems to me is very pertinent to the position here. The Judge says:

“While it is plain to our minds that the contract, which is made essential by this statute to the existence of a mechanic's lien, may be either express or implied; and, further, that it is not necessary that the contract should stipulate for such lien, or, even, that the labor or material should be furnished with an existing intention to perfect a lien on the property; nevertheless, we are satisfied that if such labor or material be furnished upon an understanding or agreement, either expressed or implied, that no such lien will be asserted, then the right to assert it is waived and cannot be enforced against a subsequent purchaser or lienholder.”

And then he goes on to say further:

“The understanding between these parties, as evidenced by a long continued usage and mode of dealing between them, namely, to open and run mutual accounts between them in relation to their respective lines of business, and at the end of every six months to adjust the balance and execute a note for the same, payable in four months, was inconsistent with the right to perfect a mechanic's lien for labor or materials furnished, there being no showing of any contract other than such as may be implied from their mode of dealing with each other.”

Now, I think that this furnishes, as I have said, a guide for the consideration of the evidence in the case. I don't think it is conclusive that there may have been different departments in the business. A great many different kinds of business are carried on now-a-days in departments, and a manufacturing company might undoubtedly take contracts and might have certain of their employees doing work in a certain line—doing certain things and certain parts of the work, and still the parties doing the work in a department might perhaps, under some circumstances, be able to effect a lien against parties outside—it might be done. But where there is substantially one corporation, or where there may be two corporations doing substantially one thing—carrying out substantially one set of contracts—one of them attending to the financial part, taking the contracts, and the other to the manufacturing, although, as is argued here, they could not be partners, still they would be the two hands by which the corporation was doing the one work, and I don't think it would be sufficient to say that the same parties—or substantially the same parties—could avoid that by getting up two corporations instead of doing it by one; they certainly could not do it so as to interfere with the rights of others.

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So far as the facts in this case are concerned, not to go at length into them, in this matter Mr. Smead was the body, the head, heart, brains and life of these two concerns, and both of these concerns may be considered as one. It was a single project, it was his project, carried out in accordance with his ideas and his notions, and whoever went into it and whoever put money into it, whether they were "wise men" or foolish men, they entered and Mr. Smead managed it. Whether anybody else could have managed it if he had tried, of course the court does not need to say.

The heating and ventilating company, as it was named, was originally his and he ran it under the name of Smead & Co. And he organized the foundry company, and owned it originally, constructed it—all the testimony shows that he owned it—owned both of the concerns. But he saw fit to make a corporation of the foundry company, and he incorporated it and stocked it at \$80,000. Testimony has been given fully as to the stock of this corporation as to the amount which Mr. Smead himself took and the amount that was taken by Smead, Wills & Co., but the result of the testimony as I understand it, from that given orally before me and also the testimony which was taken before others and submitted to me, seems to be that Mr. Smead controlled, absolutely controlled, all this stock, excepting \$5,000 of Mr. Smith's, the present receiver and who was the superintendent of the foundry company, and a thousand dollars which was held by Mr. Bowles, the bookkeeper. That is in accordance with the testimony of Mr. Bowles, who was the bookkeeper of the heating and ventilating company. So far as to Smead, Wills & Co., who held \$30,000 worth of stock, are concerned, there is no contention but what Mr. Smead controlled that; he held \$44,000, as I find, of the stock in his own name of the \$80,000, and this \$6,000 was the only stock that was held outside of Mr. Smead himself, and this was held by Mr. Smith who was the superintendent of the foundry company and Bowles the bookkeeper of the ventilating company, both of whom knew all about what was doing and being carried on there so far as it was possible for anybody to know who was connected with Mr. Smead.

And now, without going further into detail, I find from the testimony introduced before me here, that this foundry company was at all times in control of the Smead Heating & Ventilating Co.; that the ventilating company took those contracts and used the foundry company's hands for the purpose of carrying out these contracts; that the only other stockholders had full means of knowing how things were being done, and I cannot understand any principle upon which the foundry company can claim a lien against the ventilating company; and when I have said that, it seems to me that I have said what substantially decides the point in this case. I so deem it at any rate and so hold.

I have been appealed to very strongly as a court of equity, under the doctrine of the marshaling of liens, but I do not see how that doctrine applies in this case at all. It has been claimed here in argument by counsel that there are laborers here, poor men, that are losing the fruits of their labor, and that the parties here interested, the creditors of the ventilating company, had a right to proceed against what are known as the "wise men" who were stockholders at one time and are said to be entirely responsible; but there is no principle of the marshaling of liens of which I am aware that will apply to this case, and in my opinion it would be against equity. The whole doctrine of the marshaling of liens is set forth in the case of *Aldrich v. Cooper*, in *Leading Cases in*

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Equity, and I do not think there can be anything found in that case which would warrant the turning away of these assignees if they have any claim against this fund—turning them over to seek elsewhere for relief.

It is claimed also and argued very strenuously that the creditors of the foundry company have been victimized largely in this matter; I have not looked into the question whether the creditors of the foundry company have been victimized or not. The stockholders—the only stockholders aside from Mr. Smead, have suffered in the matter. If they have any remedy against the stockholders of the ventilating company who are solvent, of course the courts are open to them, and when that question comes up it will be determined; I cannot determine it here. I cannot determine here anything as to whether this foundry company had money enough to pay its debts or not. The foundry company, through its receiver here simply make these claims. My judgment is that they have no standing to make these claims, either as against the ventilating company or as against the assignee of the ventilating company.

So far as the decree in this case is concerned, I leave that to the lawyers. I have announced my conclusions and the principles which apply, and I will simply make the entry "Decree; see Journal Entry." I presume the lawyers in the case will be able to agree upon such formalities.

Of course I have not considered the question of the statutes of these different states, nor the time when these claims were filed, because I hold that the foundry company, or the receiver who stands in its shoes, have no claim upon which to predicate any mechanic's lien against the company. If I am wrong in that, I am wrong in the whole.

Mr. Alexander Smith: The decree will be entered, I suppose, finding against the liens of the foundry company and ordering the receiver to pay these claims to the assignees of the various contracts?

The Court: I will enter the decree in accordance with the decision which I have announced.

CORPORATIONS—ERROR—ESTOPPEL.

[Lucas Common Pleas, July, 1896.]

SWAN, ETC., ET AL. V. MANSFIELD, COLDWATER & LAKE MICHIGAN
R. R. CO. ET AL.

1. Where a petition contains an allegation of a decree rendered in a former action subjecting stockholders liability, but does not allege that the corporation was at the time of such decree insolvent, it must be presumed that such insolvency was alleged and proved in that action, since such insolvency was necessary to the action of the court in rendering the decree.
2. A final judgment in the circuit court, is not vacated or rendered less a final judgment by the institution and pendency of proceedings in error in the Supreme Court.
3. The liabilities of stockholders is purely a creature of the statute; it is wholly unknown to the common law. Neither at law nor in equity was a stockholder liable for the payment of the debts of a corporation in which he held stock; he only risked the loss of the investment made by him in the subscription for or purchase of his stock. The statute creates a new right, and where the statute itself prescribes a remedy, that remedy must be exclusively followed.

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4. While this liability is, in Ohio, an individual and several liability of the stockholder, on which a personal judgment may be rendered against him, yet it is not an absolute and unconditional liability enforceable against him in any event for the full amount. It is not a primary obligation to pay the debts of the corporation, but only a secondary and collateral obligation, enforceable in case of the insolvency of the corporation, requiring him to contribute in connection with other stockholders, in proportion that the amount of his stock bears to the whole, to a common fund, as security for the payment of the debts of the corporation.
5. No right is given to any individual creditor to hold either of any stockholders, or all the stockholders liable for the payment of his separate debt, to the exclusion or regardless of the rights of other creditors. Each creditor has, and only has, a right to require that all the stockholders shall contribute to this common fund, to an amount not in excess of the face of their stock, and that he shall have in common with all other creditors, his *pro rata* share of that fund.
6. A final decree having been rendered in a former action subjecting stockholders liability to the extent of twenty-five per cent. of the amount of stock held by them: Held, that such decree conclusively estops all creditors of the corporation, from prosecuting any other action in this state to enforce the individual liability of the stockholders, though not actual parties to the record in the former case, and though the decree in such former case subjected only a part of the stockholders liability.
7. So long as such final judgment remains in force, it is a conclusive determination of the liability of the stockholders.

PRATT, J.

The question submitted to me at this time arises upon demurrers, filed by different defendants, to plaintiff's petition; and the decision is now wholly upon this question, no other pleadings being before me at this time, and no questions other than those arising upon the petition having been discussed by counsel or considered by me.

The petition was filed on August 14, 1895, by John Swan, as surviving partner of the firm of Swan, Rose & Co., and E. H. Potter, as assignee in bankruptcy of Robert H. McMann, another surviving member of that firm—the other members of the firm being dead. The action is brought against The Mansfield, Coldwater & Lake Michigan Railroad Co., and a very large number—some 2,000—other defendants, as stockholders in that railroad company.

The petition alleges that the railroad company was organized in the year 1871, and owned a line of road extending from Mansfield, in Richland county, Ohio, in and through the counties of Fulton and Richland; its capital stock being \$4,600,000, in shares of \$50 each. That the Pennsylvania Co., one of the defendants, was a corporation organized under the laws of Pennsylvania, and authorized to subscribe for and own stock in other corporations; that on June 10, 1874, Swan, Rose & Co., commenced in the court of common pleas of Fulton county, their action against the railroad company, and on March 26, 1892, recovered a judgment for \$922,584.04 against the railroad company; that execution was issued June 4, 1895 and returned "no property." It alleges the death of two of the partners; the bankruptcy of McMann, and the appointment of Potter as assignee in bankruptcy. The petition then alleges that on March 31, 1877, Stephen B. Sturges, a creditor of the railroad company, "commenced an action on behalf of himself and other creditors of said company, in the court of common pleas of Richland county, Ohio, against the said last-named company and its several stockholders, the defendants herein, for the purpose of enforcing the statutory liability of said stockholders for the indebtedness of said company."

And as to that action, it is further alleged that a final decree, in the

court of common pleas, was rendered September 1, 1890, and appealed to the circuit court of that county; and that in February, 1893, "a final decree and judgment (was) rendered therein against each of the stockholders, severally, who were then parties defendant in said suit, but not against all the persons who were in fact stockholders in said company, in a sum not exceeding twenty-five per cent. of the stock of said company severally owned by said defendants who were such actual parties; and that proceedings in error, to reverse said judgment, are now pending in the Supreme Court of Ohio."

That is all that appears in the petition in reference to this Sturges action; and what is intended by the clause, "but not against all the persons who were in fact stockholders in said company," does not seem clear to me, when taken in connection with the statement that the Sturges suit was "against the several stockholders defendants herein." If the defendants there are the same as the defendants here, I fail to see the purpose or effect of this allegation.

The petition then further alleges that the defendants herein—except the railroad company—were at the time when the indebtedness accrued on which plaintiff's judgment was rendered, and still are, owners of the stock of the said railroad company. That the Pennsylvania company was an original subscriber for, and a holder of \$1,500,000 of that stock, and that the plaintiff does not know the amount of stock held by other defendants. It then alleges that the Pennsylvania company has not paid its subscription price, and that neither it, nor any of the other defendants, have paid more than 25 per cent. of their statutory liability.

The prayer of the petition is, for the recovery of all stock subscriptions, and "that each stockholder be required to pay upon his statutory liability the amount found due upon the stock held by him, to satisfy the claim of plaintiffs and the costs of suit, and for all other equitable relief.

The Pennsylvania Co. demurs to the petition, upon the following grounds:

1. "Now comes said defendant, the Pennsylvania Co., and demurs to the cause of action set forth in the petition of said plaintiffs to enforce the individual liability of the stockholders of the Mansfield, Coldwater & Lake Michigan Railroad Co., for the payment of the debts of that company on the ground that said cause of action does not state facts sufficient to constitute a cause of action."

2. "Said Pennsylvania Co. also demurs to the cause of action set forth in said petition to subject to the payment of the alleged judgment of the plaintiffs an alleged indebtedness of said Pennsylvania Co. to said Mansfield, Coldwater and Lake Michigan Railroad Co. upon an alleged subscription for stock in said last named company on the ground that said cause of action does not state facts sufficient to constitute a cause of action."

3. "Said Pennsylvania Co. also demurs to the petition of said plaintiffs on the ground that said petition does not state facts sufficient to constitute a cause of action."

Two of the other defendants, Charlotte Spice and G. F. Carpenter, file their demurrer, containing the following grounds:

1. "The allegations thereof do not contain a cause of action against this defendant or either of them."

2. "Plaintiff's petition shows that the cause of action occurred more than fifteen years ago and it is therefore barred by the Statute of Limitations."

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Numerous other defendants have filed demurrers, but the grounds stated in these two, cover substantially all those stated in the other demurrers, and they have all been submitted upon the arguments of counsel on behalf of the above demurrants.

It is unnecessary to do more than to refer simply to sec. 3, art XIII, Constitution of 1851, and to say that, on May 1, 1852, the legislature of Ohio, in accordance with the provision of this section of the constitution, passed "An Act to Provide for the Creation and Regulation of Incorporated Companies, in Ohio." Sec. 78 of this statute made provision as to this stockholder's liability. This was amended May 11, 1854, and, as so amended, stood without any change in its phraseology, until, the revision of 1880 was made. A part of sec. 78, as passed in 1854, provided, as to this individual liability, as follows:

Section 1. Individual Liability. Be, etc., That the seventy-eighth section of the act to which this is an amendment (c. 1196, p. 1897), be so amended as to read as follows: Section 78. All stockholders of any railroad, turn-pike or plank road, magnetic telegraph or bridge company, or any joint stock company organized under the provisions of this act, shall be deemed and held liable to an amount equal to their stock subscribed in addition to said stock, for the purpose of securing the creditors of such company, etc. * * *

By the Revision of 1880, this became sec. 3258; which reads as follows:

Section 3258. The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation.

It may be noticed that sec. 78 was somewhat changed in the revision; there being added, after the words "stock subscribed" the words "or otherwise acquired." But this change is not material to any inquiry here.

Section 3259, defining the term "stockholder," and sec. 3260, providing for the form of proceedings in which this liability should be enforced, were first enacted and made a part of the statute by the revision of 1880. Section 3259 still remains as the statute in force.

Section 3260 was amended March 22, 1894, 91 O. L., 88, when the following new provision was inserted:

"And when a creditor has prosecuted against a corporation an action of (at) law begun before any action to enforce the stockholder's liability, and has recovered final judgment only after such an action to enforce the stockholder's liability has been prosecuted to a final decree in the court in which the action was commenced, such judgment creditor may bring a like action against the stockholders of the corporation to enforce such judgment at any time within four years after the recovery of his said judgment, but the stockholders shall not be liable for any amount in excess of that provided in section 3258.

Counsel, in support of demurrers, have maintained the following propositions:

1. The final adjudication by the Richland circuit court in the Sturges case conclusively estopped the plaintiffs and all other creditors of the Mansfield company from prosecuting any other action in this state to enforce the individual liability of the stockholders of that company.

2. If the proceedings and judgment in the Sturges case did not conclude the rights of all the creditors of the Mansfield company against its stockholders, including the rights of Swan, Rose & Co., then the right of action of the latter against such stockholders was barred by the statute of limitations before the amendment of March 22, 1894, to sec. 3260 was enacted.

3. That the amendment made in 1894 to sec. 3260, does not aid the plaintiff, for the reasons: (1) That, if retrospective, it is unconstitutional. (2) It is not retrospective. (3) The case stated does not fall within the purview of the statute.

As to plaintiff's first proposition, the plaintiff's right of action is based upon the allegations of the petition as to the following facts:

1. That prior to and on June 10, 1874, Swan, Rose & Co. were creditors of the defendant railroad company.

2. That the several defendants herein were, at the time of the accruing of that indebtedness, holders of stock of the railroad company.

3. The insolvency of that company.

These necessary facts sufficiently appear from the allegations of the petition; and if nothing further appeared in the petition, and no allegations were made in it of the Sturges action, but two objections could have been urged to the petition, upon demurrer: (1) That it was brought in behalf of the plaintiff alone, and not in behalf of all the creditors of the company. (2) The statute of limitations.

To avoid these two objections, plaintiffs have made the allegations contained in the petition in reference to the Sturges action and the proceedings thereunder, and also rely upon the amendment made in 1894 to sec. 3260.

In its allegations in reference to this Sturges action, the petition here does not state the pleadings in that action, nor show whether there were any allegations in those pleadings, or any facts appearing in that case as to the insolvency of the company, either at the time of the commencement or during the pendency of the action, or at the time of the decree therein, either in the common pleas or the circuit court; but it being alleged that the court did entertain the action and render a decree therein, and the fact of the insolvency being necessary to such action of the court, we must presume that the insolvency was sufficiently alleged and shown in that case.

This brings us squarely to the question as to the finality of that decree.

Plaintiffs, in their petition, allege that the decree of the Richland circuit court was a final decree and judgment against each of the stockholders who were parties, and by the way of qualification, makes three further allegations, substantially as follows:

(1) That all the stockholders were not parties. (2) That proceedings to reverse that judgment are now pending in the Supreme Court. (3) That the judgment did not exceed twenty-five per cent. of the face of the stock held by each stockholder.

As to the first of these qualifications, I have already said that it appears by the petition that the stockholders, parties defendant there were the same as those now defendants in this action.

As to the second, the pending proceedings in error in the Supreme Court do not vacate the judgment of the circuit court: It was and is no less a final judgment because of the pendency in error in the Supreme Court.

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Counsel for the plaintiff, in one part of their brief, make the claim that the Sturges action has not been finally determined, because of the pendency of these proceedings in the Supreme Court, but have not cited any authority in support of that position, and I am of the opinion that the claim so made cannot be sustained.

The third of these propositions requires more full consideration. The contention of plaintiff's counsel is, substantially—and may be briefly stated as follows: That the fund provided by sec. 3258, as security for all classes of creditors, has not been by the action of the court in the Sturges case, fully exhausted, but that the stockholders having there been required to pay but 25 per cent. of this statutory liability, the remaining 75 per cent.—or so much thereof as may be necessary—remains as an additional fund of undistributed assets, which any creditor who has not been paid, still may reach by proper proceedings. Plaintiffs concede that they cannot disturb the action of the court so far as the 25 per cent. of this liability has been adjudged and enforced as against the stockholders, nor the distribution of the money that may have been realized under the judgment in that case.

It is further earnestly and ably contended that, it appearing by the allegations of the petition that the plaintiffs herein not having been actual parties to the record in the Sturges case, are not precluded or estopped from the commencement of an action to subject this remaining statutory liability of the defendants to the payment of their judgment; that this liability existed prior to the amendment of 1894 to sec. 3260, and that the right being then in existence, it was competent for the legislature to provide by that amendment for the method of enforcing this liability.

Counsel cite and rely upon, as directly supporting this proposition, *Hamilton v. Ins. Co.*, (3 O. D. Sup. and C. P., 389) the decision there was by Judge Evans, of the Franklin common pleas, and supports the plaintiff's contention, with this qualification: the decision there is based largely upon the absence of knowledge on the part of the creditors in that case of the pendency of the proceedings, and upon the fact that these creditors were, at the time of these proceedings, non-residents of the state. The learned judge says, on page 390:

"A final decree, in an action of the nature contemplated by sec. 3260, is conclusive as to all the corporate creditors who were actual parties to that action, either as plaintiffs or cross-petitioners, and it is equally conclusive as to all such creditors who were parties thereto by representation only, who accepted the benefit of such decree; and, also as to all such creditors who, although not actual parties thereto, had notice of the pendency of the action, and an opportunity to come in and exhibit their claims, but who refused or neglected to do so. But the plaintiffs in this action, *Hamilton and Rockfellow*, who are now seeking relief, were not actual parties to the former action; they received none of its benefits, were non-residents of Ohio, and had no notice of the former action for more than two years after the final decree thereon was entered."

And further on, on the same page, he says:

"The facts and circumstances of this case as disclosed by the pleadings and evidence, induce the belief that the decree which the defendants have pleaded in bar in this action, is not conclusive of the rights of *Hamilton and Rockfellow* in this action. They did not have notice 'of the pendency of the former action, have not had a day in court,'

nor an opportunity to 'come in' in the former action and exhibit their claim, and obtain the relief which they should have received."

The correctness of the position, that the want of actual notice to a particular creditor during the pendency of such a case, would enable him to come in with a new action, after the rendering of a final decree therein, seems to me—with all due deference to the opinion of the learned judge—to be one still open for discussion.

Judge Evans refers to, and counsel for plaintiffs cite, the language used in Pomeroy's Remedies in support of the rule claimed; that when one brings an action on behalf of himself and others, that in order to be bound by the decree in the case, a party other than the actual plaintiff, must, in some way and by some affirmative act on his part, come in and adopt the act of the plaintiff in bringing suit.

Mr. Pomeroy devotes an entire chapter to the discussion of the Code provision stated by him in his sec. 388—the first in the chapter—and, in a note, cites sec. 37 of our code, now sec. 5008, Rev. Stat. The statutory provision, as quoted by Mr. Pomeroy, is as follows:

When the question is one of a common or general interest of many persons, or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

It will be seen, by comparison, that this is the exact language used in the section of the Ohio Code. The discussion, therefore, of the learned author in this chapter must be taken in connection with this provision of the statute, or with similar provisions; as, for instance, the provisions in reference to assignments by failing debtors, where publication is made to creditors to come in and unite in an action and for the priority of such creditors in distribution of the proceeds of such action, and I seriously question the propriety of applying all that Mr. Pomeroy says in this chapter to an action brought to enforce the stockholder's liability.

Counsel also cite and rely upon sec. 545 of Black on Judgments. In that section the author is referring to proceedings for the foreclosure of corporation mortgages, where the parties are so numerous as to render it impracticable to bring into the case all the lien holders, and where provision is made permitting such lien holders to come in and prove their claims and share in the distribution. The author cites *Carpenter v. Canal Co.*, 35 O. S., 307; and *Kerr v. Blodgett*, 48 N. Y., 66. Both these cases are discussed by counsel both for the plaintiff and defendants. The Ohio case arose under sec. 37 (now 5008) of our Code, and the court says in its opinion, on page 316, after citing that section:

"And no doubt a judgment or order in such case is binding on all persons standing in the like predicament; but the court will take care that sufficient persons are before it honestly, fairly and fully to ascertain and try the general right in contest." Story's Eq. Pl., sec. 120.

Counsel for the plaintiff claims that this statement was not important in the case, for the reason that it appeared that the creditor there had proven his claim before the master, and it may therefore be said that this statement of the court is mere *dicta*.

The case in 48 N. Y. was one in insolvency, where, under a statute similar to our own, notice to creditors had been made public, and the court held that all creditors who failed to come in were barred—whether they had or had not notice of the proceedings. This case is therefore not directly in point here, although the opinion of the court as delivered

by Judge Earl, states, in very vigorous language, supported by high authority, rules of equity which are worthy of careful consideration.

Not, however, consuming further time or space, in discussing the views of either text writers or decisions as to general rules of equity applicable to different classes of creditors in different kinds of equity proceedings, I will come directly to the discussion of the questions affecting the rights of creditors and the liabilities of stockholders under the Ohio statute, as construed by the decisions of our own state. And in considering this question under our statute and as shown by Ohio decisions, I am of the opinion that the following principles must be kept in mind:

1. This liability is purely a creature of the statute: it is wholly unknown to the common law. Neither at law nor in equity was a stockholder liable for the payment of the debts of a corporation in which he held stock: he only risked the loss of the investment made by him in the subscription for or purchase of his stock. The statute creates a new right, and where the statute itself prescribes a remedy, that remedy must be exclusively followed.

2. While this liability is, in Ohio, an individual and several liability of the stockholder, on which a personal judgment may be rendered against him, yet it is not an absolute and unconditional liability, enforceable against him in any event for the full amount. It is not a primary obligation to pay the debts of the corporation, but only a secondary and collateral obligation, enforceable in case of the insolvency of the corporation, requiring him to contribute in connection with other stockholders, in proportion that the amount of his stock bears to the whole, to a common fund as security for the payment of the debts of the corporation.

3. No right is given to any individual creditor to hold either of any stockholder of all the stockholders liable for the payment of his separate debt, to the exclusion or regardless of the rights of other creditors. Each creditor has, and only has, a right to require that all the stockholders shall contribute to this common fund, to an amount not in excess of the face of their stock, and that he shall have in common with all other creditors, his *pro rata* share of that fund. These were the rights and liabilities existing between the creditors and the stockholders of this railroad company under sec. 3258, prior to the enactment either of the original sec. 3260 or its amendment. Neither the original act regulating the creation and regulation of corporations under the constitution of 1851, nor any amendment of the same down to the revision of 1880, designated the kind of action, or prescribed the mode of proceedings under which this liability was to be enforced. There has at all times been, and still is, great diversity in the statutes of different states in their provisions as to the liability of stockholders in corporations and as to the methods of enforcement of this liability. And prior to the decisions of *Wright v. McCormick* and *Umstead v. Buskirk*, 17 O. S., 87 and 114, respectively, it was claimed, upon analogy with proceedings in other states for the enforcement of this liability, that any creditor, upon obtaining judgment against a corporation and upon an execution upon such judgment being returned unsatisfied, might bring his separate action at law against any of the stockholders of the corporation and have personal judgment against them, or either of them, to the amount of his debt, limited only by the amount of the stock held. This was the practice in this court prior to these decisions, and it was such a judgment that was reversed in *Wright v. McCormick*, *supra*. That decision, however,

and the decision in *Umsted v. Buskirk*, *supra*, have furnished the basis of all subsequent proceedings, and were substantially incorporated into the statutes by enactment of sec. 3260, in the revision of 1880. The pertinency and importance of the decision in *Wright v. McCormick*, *supra*, will sufficiently appear from the following quotations from the opinion of Judge White, who announces the opinion of the court above in that case and in *Umsted v. Buskirk*. On page 93 the judge says:

"The object of the second defense is to set up the pendency of the suit in the Hocking common pleas as a bar, and to turn the plaintiff, McCormick, over to that action for his remedy; thus relieving the defendants of the burden of being required to respond in separate suits, instituted in different courts, for the enforcement of their liability."

And, on page 95 he concludes the opinion of the court in the following language:

"The liability on the part of the stockholders is several in its nature, but the right arising out of this liability would seem to be intended for the common and equal benefit of all the creditors. But however this may be, we are unanimously of the opinion that, where proceedings are instituted by part of the creditors of an insolvent corporation against the stockholders, to enforce such liability for the benefit of all the creditors, no creditor can acquire priority, or institute a separate suit for the enforcement of such liability in his own behalf.

The final judgment of the common pleas, and the judgment sustaining the demurrer to the second defense are reversed, and the cause remanded for further proceedings."

The syllabus in *Umstead v. Buskirk*, page 114, embodies these principles fully.

I have been furnished by counsel for the demurrants, both in oral and written argument, an exhaustive review of all the Ohio cases touching the question of the finality of the judgment or decree in the *Sturges* case. It is not, however, important that I should follow them in this review: my province is only to give the conclusions to which I have arrived.

I have also listened carefully to the able argument of the distinguished counsel for the plaintiff—who has since so suddenly died—and fully examined his brief and the extended notes which I took of his oral argument, and my clear conviction, after the best consideration which I am able to give to the subject, is, that this first position of counsel for the demurrant is fully sustained by and in full accord with the unbroken line of Ohio decisions upon the subject of the liability of stockholders and the rights and remedies of creditors of corporations under the statutes of Ohio.

In view, however, of the pertinency of the decision and the main argument of counsel for the plaintiff upon this question, I make special reference to the case of *Bullock v. Kilgore*, 39 O. S., 543. In that case there had been an action by one creditor for the benefit of all. Judgment had been rendered against the stockholders for a certain percentage of the stockholder's liability, leaving the balance unexhausted. After the final decree in that case, a supplemental petition was filed seeking to make a further charge against the stockholders because of the failure—by reason of the insolvency of some of the stockholders—to realize the full amount of the debts of the corporation. The court, after stating the object and purpose of the action, and referring—among others—to *Umstead v. Buskirk*, on page 546, concludes its opinion as follows:

"Bullock and Lewis were parties defendant, and the cause of action against them existed at the time the suit was brought, whether their liability, as stockholders, attached at that time, or when the debts of the company were contracted. It was the duty of the court, under the allegations of the petition, to determine the extent of their liability, whether primary or ultimate, and the court did determine that they were the holders of stock to the amount of sixteen hundred dollars, and were therefore liable to contribute towards the payment of the company's debts the sum of six hundred and fifty-two dollars, for which judgment was rendered against them. While this judgment remains in force, it is a conclusive determination of their liability as stockholders to pay the amount of such judgment, and no more.

In my opinion, the language there used should be applied to this case, and that so long as the judgment of the Richland county circuit court remains in force, it is a conclusive determination of the liability of the defendant stockholders in this case.

Counsel in argument have not discussed the question, whether the allegation in the petition, made against the Pennsylvania company, and not against any other defendant, that it was an original subscriber to the stock and had not paid any part of the subscription price, placed that company in any different position, so far as this demurrer is concerned, from that of other stockholders. I presume that it is conceded that if the judgment in the Sturges case is final, it is so as to any and every stockholder who was a party as to all such liability whether primary or ultimate." I hold that it was so final as to the Pennsylvania company, notwithstanding that allegation. If I am wrong as to the finality of the judgment, then the question of payment or non-payment of the subscription price might be important in determining the amount or extent of the liability.

In this view of the case, it is unnecessary for me at this time to consider any of the other questions so fully and ably argued by the respective counsel. If this judgment of the circuit court should be reversed in the Supreme Court, or in any other way vacated, these questions, or some of them, or perhaps other important questions may arise; but we need not now either discuss or anticipate them.

The demurrers will be sustained.

APPROPRIATION OF PROPERTY.

[Lucas Common Pleas.]

TOLEDO, ANN ARBOR & NORTH MICHIGAN R. R. CO. v. TOLEDO (CITY).

1. A resolution by the council of a municipal corporation as provided for in sec. 2235, Rev. Stat., for the appropriation of private property for any of the public purposes provided for in sec. 2232, Rev. Stat., and appropriation proceedings in pursuance of such resolutions had in probate court, do not deprive the owner of his property without an opportunity of being heard as to whether or not it is subject to appropriation.
2. The resolution of the council of a municipal corporation to appropriate certain land does not preclude the probate court from determining jurisdictional questions the same as provided for in sec. 6420, Rev. Stat., where the appropriation is petitioned for by a private corporation.

LEMMON, J.

The allegations of the petition show that this is a proceeding in the probate court, under sec. 2232, Rev. Stat., one clause of which reads :

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"For public parks ; and for this purpose the right to appropriate shall not be limited to land lying within the corporation." The section begins as follows : "Each city and village may appropriate, enter upon and hold real estate within its corporate limits for the following purposes, but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is to be applied." It begins then : "1. For opening, widening, straightening, and extending streets, alleys and avenues ; also for obtaining gravel or other proper material for the improvement of the same ; and for this purpose the right to appropriate shall not be limited to lands lying within the limits of the corporation," etc., down to the tenth subdivision, where it says : "For public parks ; and for this purpose the right to appropriate shall not be limited to land lying within the corporation."

It is maintained by counsel in support of the motion that it is submitted to me for an injunction to restrain these proceedings in the probate court, that the probate court has no authority under this statute to determine any questions in regard to the rightfulness of the claim asserted by the city to proceed in a condemnation proceeding to take this property for park purposes ; that, in this respect, it differs from the statute which gives authority and regulates the exercise of authority in the taking of property by appropriation proceedings by a railroad corporation, or an individual, in pursuance of law for other public purposes ; that whilst in cases of appropriation by railroad companies, etc., the probate court is permitted a jurisdiction and enjoined to exercise a discretion in reference to a matter which would protect the parties in their rights, that in the case of a municipal appropriation the whole matter is determined at and by the discretion of the municipal corporation alone, and this before the party whose land is to be taken is notified or made a party to the proceedings, and so his property is taken without his being able to be heard upon the question of that right to take the property so situated. We are cited to sec. 6420, which declares what the probate court may do, in appropriation proceedings begun by railroad, etc. It reads as follows : "On the day named in any summons first served, or publication first completed, the probate judge shall hear and determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation. Upon these questions the burden of proof shall be, etc."

Now contrast that with sec. 2235, Rev. Stat., providing for appropriation by municipal corporations. Sec. 2235 reads as follows : "When it is deemed necessary by a municipal corporation to appropriate private property, as hereinbefore provided, the council shall, by resolution, declare such intent, defining therein the purpose of the appropriation, and setting forth a pertinent description of the property designed to be appropriated ; and on the passage of such resolution, the yeas and nays shall be taken and entered on the record of the proceedings of the council."

It is argued that, under this latter statute, proceedings for appropriation, begun and carried through by municipal corporations, are beyond the discretionary direction and control of the probate court ; that the questions as to whether they will take the property and what property they will take, are determined by the municipal corporation itself, and this by resolution before the owner of the property is made a party, and hence without his being heard. And it was argued that the probate

court in such a proceeding, would have no authority to consider the question as to the right of the municipality to appropriate the particular lands sought to be taken by the city for park purposes—that their resolution designating the lands would be considered final—must be held in the appropriation proceedings before the probate court to be a final determination of that matter. We will say to you frankly, that if we were convinced that this proposition, in all its breadth, were true and that the city proceeding before the probate court to take this land without a hearing allowed to the owner of the property in question raised by him in the petition which is here filed, to-wit, the question as to whether this property is subject to appropriation or not, and thus be cut off from an opportunity to be heard upon that important question, we should have no hesitation in granting the injunction prayed for to restrain the party from proceeding in the probate court where the owner of the property would be without adequate remedy at law; and it is to that very question now which we deem it proper to address ourself. Pertinently we are cited by counsel for the plaintiff in this case to probably the last decision upon the subject by our Supreme Court, which is *Railroad Co. v. Village*, 40 O. S., 273. It is a very clear decision—written by Judge Williams—and after a very full examination of this subject, he, as it seems to us, determines the question which the court has before it in this application for an injunction. In *R. R. Co. v. Village*, *supra*, before the Supreme Court, there had been a proceeding in the probate court upon the part of the village, whereby that village condemned—appropriated—by the judgment of the probate court, a portion of a lot which had, before that, been obtained by the railroad company for depot purposes and upon which a depot for that village had been erected and was being maintained. It is unnecessary to mention the questions which arose in that case upon the subject of notice to the parties. After the proceedings for condemnation had been completed and resulted in a judgment awarding the land to the village and giving compensation to the railroad company for a portion of that lot sought to be obtained, a petition was filed in the court of common pleas of Logan county, to restrain—as in this case, by injunction, the proceedings of the village of Belle Centre in taking possession of this property, claiming that, for two reasons, they were without jurisdiction to do so: First, because the railroad company was not properly notified, and was not therefore a party to and bound by the proceedings; and, second, that the property having been once taken for public uses by the railroad company, the probate court was wholly without jurisdiction to appropriate that property or any portion of that property to any other public use which would be inconsistent with the public use for which it was first taken. And it is on that second proposition that the court, after a full examination, announced the following determination: “Hence we conclude, that municipal corporations, under the power conferred by sec. 2232, Rev. Stat., are authorized to appropriate, for necessary public offices, or a prison, land of the railroad company, (the words are used in this case “land of a railroad company”) “which is not needed or used in the operation of its road, or the conduct of its business; and that the probate court had complete jurisdiction in the appropriation proceeding instituted by the defendant, and the plaintiff is concluded by its judgment.”

The court in the decision of this case, cite other cases before this, decided by our own Supreme Court in which the common doctrine is held that the power to appropriate the lands of a railroad company which had

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before been taken for public use, is necessarily limited to such lands as are not needed and not used by it may be taken by appropriation for other public purposes. The court discuss this subject pretty fully, and I will read from a portion of the decision. Judge Williams says: "But the claim is made that the probate court had no jurisdiction over the property, because no power had been conferred on municipal corporations to appropriate property owned by a railroad company, for the uses for which the property was sought.

"This claim is based upon two propositions: First, that the property was already devoted to a public use, viz., that of the railroad company, and could not be taken for another and different public use, under the general power possessed by the defendant to appropriate real property for such use; and, second, that the express grant of power, by sec. 2232, Rev. Stat., to municipal corporations, to appropriate property owned by a railroad company, for the purpose of opening or extending streets or alleys, under the limitations therein contained, excludes, etc." That question does not arise here and it is unnecessary to read further upon that subject.

"If it be true that the defendant was without lawful authority to appropriate the property for the proposed uses, the judgment of the probate court, of course, could confer none. If, on the other hand, the defendant was clothed with the necessary power, the judgment of the court was not open to collateral attack, but could only be reviewed on error, or appeal." (That is, could only be reviewed for the purpose of determining whether the court proceeded wrongly in the exercise of the jurisdiction which it held.) "In support of the first proposition, it is argued that the railroad company was the exclusive judge of what lands were necessary for its purposes, and that the land in question, having been acquired for a depot, and thus devoted to a public use, could not be taken by the defendant for the uses proposed, because the power to so take it is not expressly granted by the statute, nor necessarily implied from the terms of the grant. The statute, in general language expressly authorizes any city or village, "to enter upon and hold real estate within its corporate limits," for "necessary offices" and for "prisons." Now, speaking of the power of municipal corporations to appropriate: "No limitation in the power is found in the statute, either with respect to the ownership, or the uses made of the property. Under a statute, which, in equally general language, conferred power upon cities and incorporated villages, to enter upon and take land for the purpose of opening and extending streets and alleys, it was held, in *R. R. Co. v. Dayton*, 23 O. S., 510, that they were authorized to appropriate to those uses lands which were the subject of the franchises of railroad companies; provided, the second use for which the land was taken was, in the circumstances of the particular case, reasonably consistent with the former use. The court say in that case, that the terms of the grant are "sufficiently broad, *prima facie*, to confer the requisite authority, and there is in such case nothing in the nature of the use to which the land has been appropriated by the railroad company, or in that to which it is proposed to subject it by the second appropriation which requires us, upon the presumed intentions of the legislature, to ingraft upon the general terms of the grant an exception which will prohibit such crossing." According to the rule established by that decision, whether municipal corporations, under the power conferred by sec. 2232, Rev. Stat., can appropriate lands owned by a railroad company, within their

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limits, for any of the specified uses, must depend upon the circumstances of each case; the criterion in all cases, being, whether such appropriation is reasonably consistent with the use to which the property has been subjected by the railroad company. And whether it is so consistent, may, in each case, become a question of fact." And that question might be submitted to a jury, I take it, under this holding; that is, the fact might be ascertained by the determination of the jury, or by the court. "Though it is not so shown by the bill of exceptions, it may be supposed that it was to this point the plaintiff, on the trial in the circuit court, offered evidence. The nature of the evidence is not disclosed. And under the pleadings, its precise character is not readily conjectured." In the petition in the common pleas, the petition set out the fact that they were about to take this property, and that the condemnations provides in the probate court, etc., and declare that they had no authority to do this.

The answer admitted the proceedings in the probate court and the intention of the village of Belle Centre to take the property for the purposes named—of a public prison—and proceeded to set up that the lot was a lot of between four and five hundred feet in length and two hundred feet wide, and alleged that the depot which the company had put upon the lot did not occupy the whole of the lot, but only a portion of it, and that the portion taken by the village of Belle Centre for the prison was 125 feet distant from the depot building, and that the portion taken was not used, and had never been used by the railroad company and was unnecessary for the uses for which they had appropriated the lot. Now the probate court thought that these allegations were an answer to the petition which was filed for an injunction in the court of common pleas, and there was no reply filed. Judge Williams goes on and examines this matter and says that he cannot see why, but presumes that the offer of evidence was not upon this point, as to the necessity of the use of the land in case that the railroad company needs it, but he says it was unnecessary to offer proof upon the question, because the whole matter was set out in the answer and there was no reply, and, there being no reply, the allegations of the answer would be taken as admitted. Now, upon the issue so made up, the petition alleged that this appropriation had been made and that they were about to proceed and take the property in pursuance of the appropriation and without authority—the probate court having been without authority, the answer setting up the matters which we have referred to and then being admitted by reason of no reply—the Supreme Court say that the railroad company is concluded by those proceedings and affirm the action of the circuit court, which sustained the common pleas in refusing to grant an injunction restraining the village of Belle Centre from proceeding to take possession of the land in pursuance of the appropriation proceedings.

I understand; then, by this case, that the Supreme Court directly determines the question as to the validity of the proceedings to condemn—properly carried on—regularly carried on—in the probate court, although the property sought to be condemned is railroad property, and have considered the question in that connection—that there was to be a consideration and determination of the matter, not only as to whether it was railroad property, but whether it was necessary to the uses of the railroad company—leaving that question as a question to be passed upon, where alone it could be passed upon, by the probate court.

Now, in that connection, we call attention again to the concluding words of the decision : "Hence we conclude that municipal corporations, under the power conferred by sec. 2232, Rev. Stat., are authorized to appropriate, for necessary public offices, or a prison, land of a railroad company, which is not needed or used in the operation of its road," (that is a matter to be determined only by the court in which these proceedings of condemnation are carried on,) "or the conduct of its business." We apprehend that the Supreme Court meant, and could have meant nothing else, and therefore did mean, that the probate court, while entertaining that proceeding for condemnation, was competent to consider the question whether the appropriation being carried on before him was consistent with the former public use to which it had been appropriated ; or, in other words, whether the land was needed or used in the operation of the railroad, or not ; that question being a question within the power, we believe, of the probate court in the exercise of its jurisdiction in the appropriation proceedings, we think it would be improper for this court to restrain proceedings of the probate court in the condemnation proceeding begun or threatened there as recited in the petition of the plaintiff.

If, in the exercise of its jurisdiction the probate court should violate the rules that should govern in that court, it will be time then for the parties to present their grievances in a proceeding for the review and correction of the errors complained of ; but, for the present it is the duty of this court to assume, and we cheerfully do assume, that the probate court will do its duty intelligently and properly, and that there will be therefore no cause for apprehension such as is indicated in the petition of the plaintiff in this case.

The motion for a preliminary injunction is therefore overruled.

Mr. Smith : "I shall probably desire to have the petition dismissed, and notice of appeal, but I would like to consider it for a few days."

The Court : Very well.

SPECIFIC PERFORMANCE—INJUNCTION.

[Lucas Common Pleas, April 27, 1895.]

JOSEPH W. HEPBURN v. CHARLES H. VOUTE.

1. Where plaintiff, by virtue of a contract with defendant, had established a boat livery which was to continue in the future, unless defendant exercised an option in the contract to buy out the plaintiff, which the defendant had not done, but was threatening to lease the property to other parties and to remove plaintiff's boats. The plaintiff in his petition set up these facts and prayed for specific performance by defendant, whereupon the court granted a temporary injunction. On motion to dissolve the injunction : Held, that this is an action for specific performance, which consists in the defendant's refraining from doing the acts threatened, and therefore, the relief prayed for is obtained by the injunction.
2. The rule of mutuality that specific performance will not be decreed in favor of one against whom it could not be decreed, does not apply where the one seeking specific performance has already performed, although equity could not have compelled performance on his part.
3. Specific performance of an agreement, "to keep a first class livery at said boat-house," cannot be compelled in equity.

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4. Where, as in this case, the compensation and benefits to be received by the plaintiff in the future was entirely dependent upon future earnings, there being no adequate remedy at law and there being no method of arriving at the damages to be recovered, the injunction will not be dissolved.
5. In determining whether a preliminary injunction should be allowed, the court may consider the comparative inconvenience to result from his decision, and need not anticipate the ultimate rights of the parties.
6. Where the defendant has shown no equity in his favor, and it appears that the plaintiff would be left practically without a remedy if the temporary injunction was dissolved: Held, that it will be continued until a hearing on the merits of the case can be had.

PRATT, J.

This is an action brought wherein the plaintiff alleges that at a certain time last year—the year 1894—he entered into a contract with the defendant, (who had a contract with the park commissioners) under which, upon certain conditions, the plaintiff was to establish and maintain a boat livery, etc., at Riverside Park. The petition alleges that this livery was used from August, 1894 to the close of the season; that it was to be renewed, that it was to continue in the future, unless the defendant exercised an option contained in the contract by which he could buy out the plaintiff; that he has not exercised that option, but that he is now threatening to lease the property to other parties and to remove the plaintiff's boats from the boathouse where he had the right to, and has, stored them. Motion is made to vacate the injunction, which was granted without hearing, on the ground that the petition does not show any right in the plaintiff to maintain this action.

It is claimed, first, on the part of defendant, that this is an action to enforce specific performance of contract. This is true I think without question. No citation of authorities is necessary to show that this is an action for a specific performance. It is the express prayer of the petition that "Defendant, Charles H. Voute may be required to specifically perform his said contract" and it is the effect of the injunction. What is sought by the injunction—the performance of this contract—does not require action on the part of defendant in the future, but that he should refrain from the doing of the threatened or alleged acts.

The leading book upon the question of specific performance is *Waterman on Specific Performance of Contracts*; and in sec. 109 the subject is discussed, as well as in other sections, but directly in that section, in which the author says, among other things, that, "An injunction frequently takes the form of a decree for specific performance by restraining a party from doing a certain act, which, by the terms of the contract, either express or implied, he is required not to do. Where a contract was entered into between two companies whereby one was to construct a railroad," etc., going on to give circumstances and illustrations. This action, then, is to be governed by the rules under which actions for specific performance are to be considered. This subject is discussed at length in this same book, sec. 6, 9, 11, and many others. In sec. 6, for instance, the author says:

"The granting or withholding of a decree for specific performance is said by all of the authorities, when speaking of the remedy, to be within the discretion of the court, neither party to a contract being entitled to the relief as a matter of right. By this is meant, not the exercise of an arbitrary and capricious will, governed by the mere pleasure of the court, but, as compared with the absolute right of a party to a judgment at law

for damages upon the breach of a contract, a sound judicial discretion, controlled by fixed rules and principles, in view of the special features and incidents of each case."

Then, in sec. 9, where the court will not interfere :

"A court of equity will not grant relief where the complaining party will not be deprived of any legal right by withholding it, unless he can show clearly that he is entitled to the relief sought. If the plaintiff has an adequate remedy at law, he must seek his redress there.

Section 11. Every contract the subject of which is susceptible of substantial enjoyment, should be enforced, provided always, the circumstances surrounding and connected with the contract bring it within the rules entitling the party to equitable relief. In such case a court of equity will decree specific performance, as a matter of course, where the contract is in writing, is fair and certain, is upon an adequate consideration, and is capable of being enforced."

It is the last sentence which I have read in each of these two sections upon which the defendant here bases his argument that this petition asks for relief which cannot be granted. Of course it is well understood that there are certain contracts that are incapable of enforcement by courts; that cannot be enforced because the court has not means of enforcing compliance with its orders: and there is a very great amount of space given in the elementary works to the discussion of contracts where it can and where it cannot act. Building contracts, generally, cannot be enforced, for the reason that questions will arise during the erection of a building that the court cannot determine, and has no means of determining; contracts for building railroad tracks, for leasing property, for leasing railroads, and operating railroads; contracts involving peculiar skill, and so on. This whole matter is discussed by Waterman in an entire chapter, commencing with sec. 196, in which he starts out by saying :

"To entitle a party to specific performance, there must not only be a valid and binding agreement; but, as a rule, the contract, at the time it was entered into, must have been capable of being enforced by either of the parties against the other. In other words, there must be a mutuality both as to the obligation and the remedy."

And he says in sec. 198 :

"Specific performance will not in general be decreed in favor of a person where the court would have no jurisdiction to enforce the contract against him, if it should be called upon to do so."

All on the ground of mutuality. There are many exceptions. One exception is where one party has performed his part of the contract. Although the court might not have been able to compel him to perform it, if he has performed it, it is no excuse for the other party. And the plaintiff in his petition here avers that he has kept and performed in each and every particular his part of said contract—that is, up to the present time. That means, of course, that he is ready and willing to keep and perform all its conditions to be kept on his part for the year 1895 and thereafter. But if you look at this contract you will see that while he has performed it—got boats there, etc., there are these obligations: "Said party of the second part agrees to keep a first-class livery at said boat-house;" and the court cannot tell whether he has performed that or not; and this court cannot compel him to keep that contract—has no means of doing it, no power to do it. So far as that is concerned, the argument seems to be with defendant. The defendant, however, cites and relie_s

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upon the case of *Steinau v. Gas Company*, 48 O. S., 324, as being conclusive in his favor. The case is in a great many respects very much like this. The judge in his opinion discusses the general rule in a great many cases, but he comes then to this on page 333: "It is important to note that an essential element of the proposition quoted above" (that is, that there must be mutuality, etc.; that is, mutuality not only in contract but in ability to enforce performance)—"is that the complaining party has no adequate remedy at law and that his damages are not susceptible of proper assessment by a jury. It goes without saying" the court says, "that if this element is found wanting, the rule laid down cannot apply." Then he goes on to say that in that case there is an adequate remedy at law. And he bases that upon the terms of the contract between the parties providing that *Steinau* should receive gas "in quantity not less than three-fourths of the present average consumption." In that respect the contract there is different from the contract here, and the holding of the court that there was an adequate remedy at law, it seems to me is not applicable to this case, for the reason here that the compensation to be received in the future, the benefits that would accrue to this plaintiff in the future under this contract, are entirely dependent upon future earnings of the livery under this contract; and there would be no method of arriving at the damages to be recovered in an action at law, except the guess of a jury, as to which the court could give them no substantial rules to govern them. It seems to me, then, that there is no adequate remedy. If the plaintiff is not entitled to this remedy, he is, in my judgment, substantially without any adequate remedy at law.

The defendant stands here now without any equity whatever in his favor. So far as the hearing upon this motion is concerned, he concedes all the allegations of the petition; and conceding these allegations, he stands here simply asking that plaintiff be turned out of court, and take his chances with a jury. I can see no equity whatever in this. Unless the court is compelled and required to deny the prayer of the petition, it ought not in good conscience to do it, as the case now stands. And the duty of the court upon a preliminary hearing is clearly laid down in the text books. In this work, *Beach on Injunctions*, sec. 25, "Where the rights of the parties are at all doubtful," this author says, "a court, if applied to for an injunction, should look at the balance of inconvenience, and act upon the consideration of comparative inconvenience which could arise upon the granting or withholding of the injunction." And this subject is discussed at length in *High on Injunction*, sec. 13, and many other sections, where he says, substantially, (not to quote his words), that the court should balance the considerations, and that its decision need not anticipate the ultimate rights of the parties or conclude its own action upon final hearing. In this case, if I dissolve this injunction and allow the defendant to contract with other parties and remove the plaintiff's boats from the boathouse, it would put this plaintiff in a position where he would be practically without remedy. I do not think I ought to do this, at least until the defendant comes in by answer, and the court has an opportunity to find out how far the allegations of the petition can be sustained by evidence, or what equity there is or may be in the defendant to resist this action of the plaintiff.

So thinking, and for these reasons, I shall decline at present to grant the motion.

RAILROADS.

[Lucas Common Pleas.]

HARRIET ROOT V. PENNSYLVANIA CO.**BAILEY V. SAME.**

1. When the construction of a railroad in the street of a city will work material injury to abutting property, the owner has such an interest in the street, that such construction may be enjoined at his suit until the right to construct such road in the street shall first be acquired under proceedings instituted against such owner as is required by law for the appropriation of private property.
2. When a former owner has signed a contract with the railroad company, releasing to the company all claims for damages by reason of any railway or side track which should be builded along there, one who purchases with notice of such contract, is bound by it.
3. Possession by the railroad company of part of the highway at the time of such purchase is constructive notice of the existence of the contract.

LEMMON, J.

These are actions which were begun in this court to procure a perpetual injunction restraining the Pennsylvania Co. from proceeding to lay side tracks over the ground upon the northerly side of the main track of the Pennsylvania Co. going northeastward from its depot, upon the ground that although they are laid in Water street, yet the abutting property—owned respectively by Mrs. Root and Daniel E. Bailey—will be injured by reason of the additional tracks that would be laid there—not only by the additional use that would be caused but from the greater and almost total destruction of the street that would be occasioned by the cars standing on and along these side tracks and the larger amount of cars along there.

The decision which we will announce is one that is following an application of art. 1, sec. 19, of the constitution of Ohio, which declares that :

“ Private property shall ever be held inviolate, but subservient to the public welfare. When taken in the time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money.” * * *

The petitions in these cases each of them recite that the railway company is proceeding to take possession of additional portions of this street, and this without having obtained the consent of the abutting property holders whom they claim will be injured by such taking possession and use ; and the only question in the light of this constitutional provision which is left for the court to determine, is : whether these parties have an interest in Water street, upon which their lots abut, which cannot thus be taken by the railway company. That question we deem to be settled by the decisions of our Supreme Court.

I cite *Railway v. Cummins*, 14 O. S., and particularly the language of the court on pages 548-9, where the court say :

“ We have already had occasion to say, that it is a grave error to suppose, that a landowner who had granted, or from whom an easement

has been taken for a public highway, while it is held to its original uses, could complain that it was taken from the control of the public authorities and placed in the possession of an incorporated company; that it was changed from a dirt road to a plank or turnpike road; or that it was supported by tolls instead of a public tax; but it is a still graver error to suppose, that such an easement can, at the will of the public, be lawfully appropriated to the uses of any sort of a highway, without furnishing just cause of complaint on his part. So far is this from being true, that it is entirely clear, that such a change as necessarily and wholly excludes the particular uses for which it was required would work an entire extinguishment of the easement; and that it is equally clear, that, with the continued enjoyment of these uses, and in furtherance of the same general purposes, a new use might be authorized, requiring other adaptations, and imposing additional burdens upon the land, or destroying or impairing the owner's easement in the highway, which could not be legally resorted to without a further appropriation and compensation. The reasons for this have already been adverted to. Such changes and additions are not within the scope and spirit, or fair intendment, of the original grant of appropriation. The man who grants an easement for a common road, does not consent that the uses incident to such a work may be excluded, and the land burdened with the exclusive occupation of a locomotive railroad—although both are highways, and, each in its own way, facilitates travel and transportation. Such an easement, whether acquired by a voluntary grant or appropriation, requires a certain reasonable and customary adaptation of the land, to all the various uses to which such a road is applied. What this will require, and what burden will be imposed upon the land, may be easily foreseen by him who grants it voluntarily, and easily estimated for him from whom it is taken by appropriation; and whatever it is, with the necessary incidents of maintaining it perpetually, constitutes the public right and interest—all else is private right, and securely guarded from invasion by the constitution of the state. With this public right, the public, through its representative—the general assembly—may deal without restraint. It may regulate and modify the manner of using it by the public at large, and may, undoubtedly, devote its own interests to the maintenance of new structures, placed in the hands of other agencies, and calculated to advance and enlarge the general purposes for which the highway was originally constructed. But where these new structures and new modes of travel, devolve additional burdens upon the land, and materially impair the incidental rights of the owner in the highway, they require more than the public has, or can grant, and the deficiency can only be supplied by appropriating the private right, upon the terms of the constitution."

That case follows *Crawford v. Village*, 7 O. S., 460, in which the court holds this language; page 469;

"Distinct from the right of the public to use a street, is the right and interest of the owners of the lots adjacent. The latter have a peculiar interest in the street, which neither the local nor the general public can pretend to claim: a private right of the nature of an incorporeal hereditament, legally attached to their contiguous grounds and the erections thereon; an incidental title to certain facilities and franchises assured to them by contracts and by law, and without which their property would be of comparatively little value. This easement appendant to the lots, unlike any right of one lot owner in the lot of another, is as much property as the lot itself."

These cases have been followed by *Railroad Co. v. Williams*, 85 O. S., 168, pages 171 and 172 :

"As between the public and the owner of land upon which a common highway is established, it is settled that the public has a right to improve and use the public highway in the manner and for the purposes contemplated at the time it was established. The right to improve includes the power to grade, bridge, gravel or plank the road in such a manner as to make it most convenient and safe for use by the public, for the purposes of travel and transportation in the customary manner, which is well understood to be by the locomotion of man or beast, and by vehicles drawn by animals, without fixed tracks or rails to which such vehicles are confined when in motion. These constitute the easement which the public acquires by appropriating land for the right of way for a highway, and these, in legal contemplation, are what the owner is to receive compensation for when his land is appropriated for this purpose. The fee of the land remains in the owner. He is taxed upon it ; and when the use or easement in the public ceases, it reverts to him free from incumbrance.

"In the exercise of the right of eminent domain, the state, through the general assembly, may delegate to a railroad corporation the power to appropriate a right of way for its road upon and along a public highway. But the appropriation for this purpose cannot be constitutionally made without making compensation to the public for the injury thereby occasioned to its easement in the highway ; and also making compensation to the owner of private property taken for the use indicated. In such case, the rights of the public, and the rights of the owner, are entirely distinct ; and the consent, express or implied, of one to the appropriation, would not bind or affect the rights of the other. But we are not dealing with the public right. It has already been said that the plaintiff, in the probate court, was the owner in fee of the land covered by the highway. This was her private property within the meaning of the constitution, subject only to the easement of the public therein. The nature and extent of this easement was above shown. The railroad company, by occupying the highway, constructing its track, and operating its trains thereon by steam motive power, completely diverted the highway from the uses and purposes for which it was established. This new use, to which the highway has been diverted, imposes burdens on the land that are entirely different from, and in addition to, those that were imposed by the highway. The right to so divert the use, and impose additional burdens on the land, could only be acquired by the corporation by agreement with the owner, or by appropriating and making compensation therefor, in the mode prescribed by law."

And again, in *Railway Co. v. Lawrence*, 88 O. S., 41, the Supreme Court say :

"Where the construction of a railroad in a street of a city will work material injury to the abutting property, such construction may be enjoined at the suit of the owners, until the right to construct such road in the street shall first be acquired, under proceedings instituted against such owners as required by law for the appropriation of private property."

This last case we regard as conclusive of the identical question now presented to the court. It is upon these authorities and the constitution which they construe that we sustain this injunction and make it

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perpetual in favor of Daniel E. Bailey against the Pennsylvania Co., and therefore overrule the motion to dissolve the injunction in this case and enter a final decree in pursuance of the understanding between the attorneys at the time the case was submitted.

As to Harriet Root, a different question arises, which will cause us to dismiss her petition. It was shown on the hearing that the former husband of Mrs. Root, Thomas Courtright, while he was the owner of the property which she now represents, and to protect which she brings this suit, had signed a petition (or contract, perhaps I should call it) to the Pennsylvania Co., the defendant, or one of its predecessors, I will not be sure—I think perhaps it was the trustees of the Toledo and Woodville railroad—in which he, with others who signed the contract, released to the railroad company all claim to damages by reason of any railroad which should be builded along there and any side tracks which should be builded along there on either side of the main line of the railway. The contract of release which was given in evidence, we regard as full and complete.

This was answered by counsel for Mrs. Root by saying that she did not take the interest of her husband by way of descent, but that she purchased the property upon a sale made by order of the probate court, hence that she holds the title, not by descent, but by purchase, and as a purchaser she is not bound by the contracts of Mr. Courtright.

Ordinarily that proposition would be correct; but at the same time there is another proposition in this case: that the railroad company were at the time in actual, notorious, open and adverse possession of this property, and she is chargeable with notice of that fact, and she is chargeable with the duty under the circumstances of inquiring into and ascertaining all that she could ascertain by inquiry as to the right of the party that was in possession there, when she purchased. Inquiry would have shown her that the Pennsylvania Co. were in possession there in pursuance of the contract of her former husband, then deceased, and she would have ascertained this and ascertained the rights of the Pennsylvania Co.

We will not therefore at this time be permitted, in law, to say that she is not bound by the contract which her husband made. She purchased with notice—that is the law implied that she had notice because of the possession, and hence, having purchased the title of a person who had released to the railroad company, for a valuable consideration the right to build these roads and maintain them and to use them, she will not now be heard to object to the company's making that use which they have been permitted to make in pursuance of the contract with Mr. Courtright—her case therefore will be dismissed.

AFFIDAVITS—PLEADING—RECEIVERS.

[Lucas Common Pleas, June 13, 1896.]

HATTIE JAY V. WASHINGTON I. SQUIRE.

1. An affidavit drawn and ready for the signature, and jurat of the officer ready to be sworn to, but not sworn to, will be disregarded.
2. A deed not acknowledged is good as a contract.
3. Whether a defendant can be compelled to answer interrogatories before his time for answering has expired, although he has before the expiration of such time filed an answer in which he fails to answer the interrogatories, *quære*.

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4. A receiver is never appointed where a court of equity can find other less stringent means to protect the rights of the parties.
5. In an action asking for the appointment of a receiver, the defendant cannot urge as an objection to the plaintiff's right in court that her interest in the property has been conveyed to her by her husband in fraud of his creditors: that question can only be raised by the husband's creditors.
6. The action of a court or judge in granting a receivership does not determine the ultimate rights of the parties, or even affect them, except so far as it preserves and retains control of the property to answer to the rights of the parties as they may be finally determined.
7. An application for a receiver is an ancillary proceeding; it is not a final remedy. As a final remedy it is very seldom allowed; there is hardly ever a case in which, as a final remedy, it can be sustained. As an ancillary remedy it may be called an equitable attachment. It is sometimes called an execution before judgment. Its purpose, however, and its end, and the only end it can subserve, is to reach and keep possession of that which is in dispute until the rights between the parties can be determined.
8. Where the plaintiffs' claim of an interest in the property was denied by the managing trustee and the court found that they had a probable interest, but did not find that the business was mismanaged or that the trustee was insolvent, it was held, that no receiver would be appointed, but that the trustee should give bond to respond to the plaintiffs for any interest they might have in the property; that the plaintiffs should be given reasonable opportunity to ascertain how the property was being managed, and that the trustee should file a statement of the accounts of the business.
9. A managing trustee should allow any one claiming an interest in the business, to see the accounts of the business.

PRATT, J. (orally.)

This is heard upon the amended petition of the plaintiff, filed June 1, 1896, and the cross-petition of Martha J. Bowman, filed May 14, 1896. I never have seen the original petition, and do not know who were the defendants, all of them, nor when it was filed, but that is not important. This petition and cross-petition are very lengthy, and I do not need to go through them in any detailed way—although I have been over them myself.

There are a large number of contracts set up in these pleadings. Among them, and the more important ones is the contract, marked "A," of May 28, 1894—a lease by Davis to King, for five years, on a royalty of one-sixth; about this, there is no dispute. Then there is an agreement, of March 6, 1895; and in this the defendant, Squire, first appears, it being an agreement between George H. Jay, John C. Davis and the defendant, Squire, providing, substantially, that Squire buys one-fourth interest in the leasehold; Davis to have one-sixth royalty, as the owner of the land, and one-half interest in the leasehold, and Squire one-fourth and Jay one-fourth, and that Jay has charge of the operation, four wells only to be completed without the consent of the parties, and they are not to create any liability without the consent of all. On May 2, 1895, there was a contract between Jay, Davis and Squire, reciting that it is between them as co-partners, and it is therein provided, in brief: First, that Squire is appointed a trustee, with full power to collect, disburse, and generally operate. Second, that Squire agrees, as trustee, to keep a record of all transactions and hold it open for inspection at his office, whenever called for, and to do nothing contrary to the trusteeship.

The petition then proceeds to make charges against Squire, charging him with having disregarded his trust and being in disregard thereof; that he is in possession and claims to be the sole owner, and refuses to permit the plaintiff to have any voice or to exercise any control, or, per-

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haps, even to allow him to enter upon the premises, at least that is the allegation of the petition; and then proceeds to charge that Squire is also reckless and extravagant in business and is appropriating all the proceeds of it to his own use and benefit.

The answer and cross-petition of Martha J. Bowman brings in, as I suppose for the first time, new parties, and among the rest, Mr. Warren P. Noble, alleging that Davis, the owner of the property,—who received the royalty as owner—was only the equitable owner, that Noble holds the legal title, and holds it for the purpose of protecting his interest as mortgagee. It then alleges that on March 25, 1895, a conveyance was made by J. C. Davis to J. H. Davis of the ownership of seven-twelfths of the oil; that on June 21st, J. H. Davis conveyed one-half of his interest to Martha J. Bowman, and on the same day conveyed the other half to Parmelia, the daughter of J. C. Davis, in trust—the petition alleging that it was J. C. and J. H. Davis, both. The Bowman deed was not recorded until July 16, 1895. It then alleges that on July 9, 1895, J. H. Davis—although not at that time having any title in the same, and the conveyance not being of record—attempted to convey the whole to Parmelia Davis by deed filed on the 10th; and, on July 20th, Parmelia Davis conveyed to Warren P. Noble, which was recorded on the 25th. It then makes several charges: that this was instigated by Squire and all done for the purpose of defrauding Martha J. Bowman. It then proceeds to make the same charges, in substance, against Mr. Squire that are made in the petition. Both the plaintiff and the cross-petitioner pray for an accounting with Squire and for a settlement of the affairs, and for a receiver. This cross-petition also states that on July 19, 1895, a contract was made with Noble—between Noble and Squire—and assented to by J. C. Davis, by which it is recited that Davis is the owner of the lands, subject to the Noble mortgage, and that Squire was to make advances and one-sixth of the royalty to be applied to the debt and \$200 per month to be applied on the interest, as per statement made between them of the account; and that Squire, after being reimbursed for his advances and the payment of the debt to Noble, was to dispose of five-sixths of the leasehold, which would be all except the royalty of one-sixth: one-quarter to J. C. Davis, one-half to Squire and one-quarter to blank. This was in the agreement between Davis and Squire, the agreement between Noble and Squire being simply that he should reconvey this when his debt was paid, Noble having then been given the legal title until his debt was paid. But Mr. Noble, in his testimony, stated that he never heard of this blank quarter and that there was no such thing as any blank quarter in any paper which he signed, and it so appears in the papers which are produced.

Now the matter on hearing here, of course, is for the appointment of a receiver, simply. I will say, before speaking more directly to the point, that answers have been filed by Squire, both to the amended petition and to the cross-petition, in which he admits the execution of the papers, so far as he has signed them, and denies all other allegations. Then he alleges that all business relations with Jay were ended on or about July 1, 1895; that in consideration of Squire's assuming the indebtedness to Noble and making the agreement with him, he, Jay, relinquished all interest of himself and his wife in the property, of every name and nature, and that he entered into possession of the property. He alleges that Hattie Jay held whatever interest she had in the property in trust to George H. Jay, and he asks to be entirely dismissed.

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Squire also answers the Bowman cross-petition, admitting the execution of the papers, so far as he signed them, and denying anything else; denying that Bowman ever had any interest in the property and denying that his wife had any interest in it—denies that Martha J. Bowman had any right in it except the fact that he has in his petition claimed to be the entire owner of the property.

There is an answer of J. C. Davis to the cross-petition of Bowman: I do not find any to the petition.

Mr. Hamilton: He answered the petition.

The Court: Well the answer is substantially a copy of Squire's answer.

There has been a mass of affidavits filed in this case. The petition and the cross-petition sworn to in the form of affidavits and submitted as affidavits. Mr. Jay files an affidavit also in support of the petition, the petition being sworn to by Mrs. Jay. There are also some affidavits filed as to the refusal of Squire—quite a number of them—but they are of no consequence at all, because Squire does not refuse, by his answer, and there is no necessity for any proof upon that subject; he claims that he is not required to account.

Then, as to the mismanagement, Mr. Jay files an affidavit in support of the allegations of the petition, that there has been mismanagement of the business; and there are two rebutting affidavits which have been filed since Saturday: one of Bowman and one of Jay, but they are simply in rebuttal of the affidavits filed by Squire and Davis.

On the part of defendant, there are twenty-two affidavits on file. Very few of them are brief, and a good many of them are very long. There are ten of these affidavits that simply relate to the defense of Mr. Squire to the charge of mismanagement of the estate, but so far as these are concerned, the weight of the evidence is all on his side. Of course he admits, in one of his affidavits that he had instructed the person in charge to forbid anybody going upon the property. And Mr. Jay says he was not allowed to go upon the property, and so it would not be expected that much testimony would be furnished on this point by the other party; but, as the case stands, the evidence as to mismanagement is all upon one side. There are ten of these affidavits as to mismanagement. I have not paid much attention to them, except to see the general drift of them, and there I stopped. Then there are three affidavits here made to contradict the affidavits with reference to Mr. Squire's interviews with Mr. Jay, and I have not considered those, of course. They go to the question of whether he has accounted for and agreed to account for or refused to account. Then there are in addition to that three affidavits by Mr. Squire; three affidavits of J. C. Davis and two affidavits of J. H. Davis, and an affidavit drawn and ready for signature, and the jurat of the officer ready to be sworn to by Parmelia Davis, but not sworn to, and to which I have not paid attention.

Mr. Hamilton: That was a mistake.

The Court: Now there is also an affidavit by Mr. Noble, to which I have not paid very much attention, for the reason that we had his testimony upon the stand, which is much more satisfactory than an affidavit.

Now, so far as these affidavits are concerned, they are full of criminations and recriminations from the start to the finish. As I have said in reference to the pleadings, both parties have been liberal in their charges against the other, and *vice versa*. I confess I have labored

through these affidavits—though I have not read them word for word—but I have gone through them for the purpose of finding out what light they would throw upon the case, and they throw just this light upon it: Here is a bitter contest between these parties. They do prove that these parties having or claiming any interest in it never can get along together. So far they are important, I confess that I am not prepared to say what they prove and do not prove. That there is a conflict here, is perfectly evident, without any question. I have made a memorandum here of the facts, but I do not think I need to spend time to go over them at any length; but I will say that from the papers themselves, and from Mr. Noble's testimony here upon the witness stand, and considering all the circumstances, I have tried to get a general idea of this transaction and of the course that I ought to take upon this hearing. Mr. Noble's testimony, considering the position he is in—he is looking out for himself and not paying much attention as to the rights of the other parties and what they did between themselves—at the same time his testimony does develop, as it seems to me, pretty clearly the transaction, and his testimony is not wholly upon the one side or the other; it would naturally be given fairly and honestly, as it was, without the slightest question. Now the points that I have got to determine, as it seems to me, are:

First—Have Jay, or Bowman, a probable interest in the property in question?

The position is taken by counsel for Squire that neither Mrs. Jay nor Mrs. Bowman have any rights here in court. It is alleged in the petition by Squire—and he is supported by these affidavits—that Jay conveyed his interest to his wife for the purpose of keeping it out of the reach of his creditors. Now, so far as these parties are concerned, I do not think that it lies in the mouth of Mr. Squire to raise the question whether Mrs. Jay, or Mrs. Bowman are holding property for their own interest, or in trust for their husbands; that is only a question that their creditors have to do with and not Mr. Squire, who has been dealing with these parties—certainly with Mr. Jay, and is now claiming an interest under Mr. Jay; but I do not think, in any event, that this is a matter of any concern to him, as to the character in which these parties make their claims.

On the other hand, the claim is made on the part of Mrs. Bowman, and perhaps on the part of Mrs. Jay, that they are not bound by this trust arrangement or agreement, that they are not bound to regard Mr. Squire as a trustee for them. I cannot see, myself, how this would benefit either Mrs. Bowman or Mrs. Jay; I think it is directly against their interest to make any such claim; but, whether it is or not, whatever rights they take, or either of them—Mrs. Jay or Mrs. Bowman—whether they take it for themselves or in trust for their husbands—they take them under these various contracts and they cannot go behind that under which they claim, I think that is all I need to say upon that subject, of my views. If they are here claiming any rights, they must claim in recognition of the contracts.

This brings me to a consideration of the question, whether these persons have a probable interest in this property.

As to Mr. Jay's interest, it is certain that Mr. Jay did have an interest in this property, an interest which is shown under Mr. Squire's own pleadings, which they held in common between them; Mr. Jay originally having one-half, and conveying one-half of his half to Mr.

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Squire; and they, under the contract made between them, after that time operated the wells, or attempted at least, to operate them. Squire, admitting that Jay did have an interest, claims that up to June 21st, they were acting under that interest; but that on or about July 1st, Mr. Jay surrendered all his interest, for the reason that he had no money to carry it out and he wanted to be released from the obligations under which he rested; that he was unable to pay the interest, or provide any money with which to pay the interest. That is true. Although he in some of his affidavits admits that at the time Mr. Jay was promising that he would raise some money and undertake to take care of his share; also in one of them stating that Mr. Jay came to him after the 19th—after the contract had been made with Squire—and asked to be let in—the substance of his statement is, that he asked to be reinstated, to come in again, claiming that he had before that time surrendered.

Now, Mr. Noble's testimony is important, as it seems to me, upon this question; and Mr. Noble, in his testimony, in addition to the general statements made, that Jay and Bowman were both of them active in procuring the arrangement which was made on July 19th, by which he should extend the time upon Squire's consenting to advance the money, he testifies in reference to the presence of Mr. Jay, particularly, on page 9 of the transcript of his testimony, furnished by the stenographer, as follows:

"Q. At the time you made this contract which you have spoken of, don't you remember that Mr. Jay at that time was not there; the truth about it is that he was sick? A. No, sir: he was there. I never saw him at any other time only then."

This was testimony for the purpose of showing that Mr. Jay was not there. I think that that was on cross-examination. If his testimony had been that Mr. Jay was not there, it would have been directly against Mr. Jay. But he says: "I won't say that he was there when I made the contract; he was there when I came here to make it, and I met him and Squire and I remember very well that he said that he had no money at present, but expected to get some by the sale of some land in Kansas."

Not to read too much of it, although I think that all along here bears upon the question:

"Q. You never met him but once, did you?" (He had stated that.) "A. I don't think I ever met him but once, and I remember very well that when I was insisting upon payment, he said that Mr. Squire thought he had no money, but he said that he was trying to sell or negotiate the sale of some land, I understood it to be in Kansas, with which he said he expected to do something, but he had nothing now."

Later on, he states it a little different, in answer to a question by Mr. Thatcher:

"Q. Did you understand why Jay was anxious this should be done?" (Speaking about entering into a contract.) "A. I don't know."

"Q. Did he say he was representing anybody but his wife and himself? A. No. I understood that he was acting in the interest of Squire. I understood that Mr. Jay was expecting to get some money and take an interest with Mr. Squire."

Stating it a little differently and not so strongly, as I would gather, for Mr. Jay's benefit, as he had stated it formerly. But, however this may be; looking at this whole matter and applying a little of our common sense to it (for we must apply our common sense to all these trans-

actions) it being perfectly evident that Mr. Jay had had an interest in this property, and a large interest (about one-half) and when he got embarrassed he sold one-half of that to Squire, who had money and was undoubtedly ready to purchase, and he struggled along with this until he got in it a thousand dollars, and although Squire claims in his affidavit that while he was managing it he got out all he had advanced, still, it is an open question, and Mr. Jay claims that he had something like a thousand dollars involved in it. Now it is not rational to suppose that he was going to give that up so long as there was a prospect or chance for his being able to save something that he had got in there; and Mr. Squire, either in his affidavit or his answer, makes no claim that he had paid him anything. He says, I think in his answer, "for a good consideration." That is simply a phrase of the lawyers proper to be put into a pleading; but the affidavits are that Jay simply laid down, and consented, as I have said, in consideration of his being released from his obligation, to simply drop out. Now, of course, men that have a large amount of property, are looking out for obligations that may come on them. But the affidavit of Mr. Squire is that Mr. Jay is insolvent—substantially that—or that, fearing his creditors, he put some property into the hands of his wife; and it is natural, I suppose, that he would not be as afraid of his liabilities as a man might be under other circumstances. The facts seem to me to be that he was "in a hole"—to use a common, but not a judicial expression—that he was trying to keep this thing along; and that the whole testimony of Mr. Noble shows—that both he and Mr. Bowman were trying to keep this thing along and get something out of it, that they made an effort to get something out of it, if they could.

Now, so far as Mr. Bowman is concerned, his wife has a deed, which was presented here in evidence, of one-half of the Davis interest. The correspondence produced by Mr. Noble shows that Mr. Bowman was acting in the interest of Mr. Davis; the evidence shows that Mr. Davis, being a man who had an infirmity in his eyesight—a fact which we all of us know, outside of the record—naturally would be desirous of an acting assistant. Mr. Bowman was a man busy in that business; and while Mr. Davis in his affidavit sustains Mr. Squire in everything, and his affidavit is substantially the same in all respects with that of Mr. Squire, he does not show, or attempt to show, that he in any way recompensed Mr. Bowman for any of his services in the matter. Mr. Bowman, in his affidavit, says that he was to have an interest in the property, for his services. He does not say how much. The statement is not a very conclusive one, from want of particularity; but it is entirely probable—to use again our common sense—that he would not be doing this work for nothing, and no claim being made that he had been paid anything or given anything, it would be reasonable to suppose—as Mr. Noble's testimony shows clearly that he was the party who really brought about the arrangement—that he had a purpose in such acting and was not doing it for nothing—it is not reasonable to suppose that he was. The probabilities all are that he had some sort of an arrangement with Mr. Davis by which he was to assist him in this and was to have an interest as a compensation for his services, and that view is sustained by the fact that here was a deed made giving him an interest in the property. Now that is met in the affidavits and charges are made broad enough to send half a dozen men to the penitentiary, if they were true, as against Mr. Bowman—charges involving the notary who certi-

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fied to the acknowledgment of the deed, charging that he was not present at the time it was signed; that one of the witnesses was not present at the time it was signed—but these are of character with the other charges, and even if the deed were not acknowledged, it would be good as a contract, although it is claimed and J. H. Davis swears that he made it simply at the solicitation of Mr. Bowman and did not read it; that the contract made June 22, 1895, signed by Parmelia Davis and Martha J. Bowman—in which Mr. Squire was a nominal party, but not signed by him, and it is alleged that that was signed without being read, and J. H. Davis swears that it was not signed by Parmelia Davis knowing what it was, yet Parmelia Davis has not made any affidavit in that respect.

Now, what I have said in reference to J. H. Davis applies to Mr. Bowman. The testimony of Mr. Noble shows to my mind clearly and conclusively at least that Mr. Bowman supposed he had an interest in it and claimed that he had, it cannot be explained upon any other ground.

So far as the legal questions involved in this case are concerned, there is very little in it that is not common to all lawyers. An application for a receiver is an ancillary proceeding; it is not a final remedy. As a final remedy, it is very seldom allowed; there is hardly ever a case in which, as a final remedy, it can be sustained. As an ancillary remedy, it may be called an equitable attachment. It is sometimes called an execution before judgment. Its purpose, however, and its end, and the only end it can subserve is to reach and keep possession of that which is in dispute until the rights between the parties can be determined. The action of a court or judge in granting a receivership does not determine the ultimate rights of the parties, or even affect them, except so far as it preserves and retains control of the property to answer to the rights of the parties as they may be finally determined.

The cases, in Ohio, upon this subject, are not very numerous; but the case of Cin., Sandusky & Clev. R. R. Co. v. Sloan, 31 O. S., 1, lays down the rules clearly; the case of C., H. & D. R. R. Co. v. Duckworth, 1 O. C. D., 618, lays down also the same rule, and a rule that is understood by every lawyer.

Here, the defendant, Squire, is in the conceded possession of the property. The plaintiff and the cross-petitioner claim an interest in that property. I only find this, so far as their interests are concerned: that it seems to me that they have a probable interest here, to such an extent that they ought to have a chance to litigate it. You cannot deprive a man of that.

These affidavits certainly prove diligence on the part of the attorneys, and they prove, aside from that, that there is an irreconcilable conflict between these parties, but what else they prove, I cannot say.

So far as the appointment of a receiver is concerned, there are two objections:

1. The evidence does not sustain the allegations, that there is any mismanagement of this property by Mr. Squire. The prosperity of the concern, is an answer to that.

2. Another objection, and a serious and important one, is, that there is no showing here whatever that Mr. Squire, the trustee, who has been selected for the purpose of attending to this property—under whom, (as was remarked the other day) these parties must claim, if they have any claim at all—is insolvent; and he alleges and claims and swears himself that he is responsible for any claim that may be made against him. It is neither charged nor proven that he is insolvent.

But there is a repudiation on his part of the rights of these parties, and he refuses to allow them any opportunity to ascertain as to the condition of the property, the state of his accounts, or in any way to recognize their rights. The testimony of Mr. Noble shows that during ten months since the execution of the Noble agreement, there has been paid to him as his one-sixth royalty of the property—I have not figured this up exactly, but Mr. Brumback has furnished me the figures, which I have compared so far as the amounts are concerned, with Mr. Noble's testimony—\$3,587, as one-sixth, which would make the whole amount \$21,000 and something. The only thing that Mr. Squire does in his affidavit is to swear that he has kept a full and correct book account of all these transactions. He says that he is \$—— out of pocket at the time of the making of the affidavit. Now, no hardship can come to Mr. Squire from showing these accounts; and so far as there is any claim by anybody that they have an interest in them, it is his duty to show these accounts.

There are interrogatories in the cross-petition of Mr. Bowman, which he has not answered or given any excuse for not answering. Perhaps it may be said that he is not required to answer them yet; that the time has not expired for his answer; but still he has filed an answer, in which he does not make any statement, or any showing in his affidavits, and he says in his affidavits that he has given the parties in charge of the property orders not to allow other parties to go upon the property. There is no evidence to show that he is insolvent or unable to respond.

There is this rule of law, which I think is undoubtedly important, and I might say controlling. That a receiver is never appointed where a court of equity can find other less stringent means to protect the rights of the parties. On this proposition, I do not think I need to cite authorities, although I have looked up some of them and the findings and methods that they take. I have had High on Receivers which I took up while engaged in the trial of a jury case, and looked it through a little, and I find this in it, which is also cited in the Duckworth case, *supra*, by our circuit court: that a court may require parties to give a bond, to protect parties claiming an interest. There is a note here to sec. 478, in High on Receivers in which Judge McCune, 7 Abbott's Practice, N. S., 56 (I don't know what the case is) in which the principle is laid down—and I think it is one that is clearly correct—That the court may look at the situation and the parties may give bonds—that that may be done. Now I think that applies to this case. As I look at it from the evidence before me now, this property is being managed so that it is producing a very large income, and it would be liable to be disastrous to change the management; at least the court ought not to change the management, unless it is necessary to do so to protect the property and the rights of the parties; and the conclusion I have come to in this matter is as follows:

First—I think that the defendant, Squire, should be required to give Jay, or Bowman, or their agents, a reasonable opportunity, by such order as may be authorized, to visit this property and to ascertain the manner in which it is being managed. Of course I emphasize the word "Reasonable." He is the trustee, and they should not be allowed to interfere with his management; but, if they have any probable interest there, they ought at least to have a chance to know what is going on—a reasonable opportunity.

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Second—That Squire should be required to file a full statement of his account in reference to these transactions, within a time to be limited, and which of course should be reasonable, but that it should be promptly done.

Third—That Squire should file a bond—in one of two ways—in such an amount and with similar conditions as would be required of a receiver; or to give a bond either to Jay or to Bowman, to respond to them for any interest that they might be found entitled to receive out of the property. This, of course, is upon the basis that Mr. Squire is responsible, as he says he is, and it would be no hardship for him to give the bond.

I may say in reference to this that one of the remedies resorted to in a case of this kind is injunction, to prevent any transfer; but I think that this will be all that will be necessary and that it would hardly be reasonable to keep a man tied up in the management of his property so long as he was able to secure the parties in any interest that they may have.

Fourth—I think a referee should at once be appointed, to hear and determine all the issues, and that the order should require a prompt report from him of all these matters, in order that they may be as speedily determined and settled up, upon proper testimony and a fair hearing, as may be practicable. •

These, gentlemen, are my conclusions.

Mr. Hamilton: What order will the court make?

The Court: Simply the substance of what I have determined: First, he shall be ordered to give Jay or Bowman, or their agents, reasonable opportunity to ascertain the manner in which the property is being managed; Second, to file a full statement of his account; and to file a bond—either a general bond, made to the clerk, for the interest of whom it may concern, or something of that kind, or a bond may be given to them individually. In the first case, it should be filed in court and approved by the clerk; and, in the second place, approved by the court and filed with the clerk; and then a referee to be determined upon, to hear and determine the issues in this case. Counsel may agree, of course, upon a proper referee. It should be some competent person. It is a large matter and will be complicated, and a matter which will require a competent referee. If you can agree, of course I will appoint whoever you agree upon. If counsel cannot agree, of course the court would have to appoint.

Mr. Hamilton: I am utterly and entirely opposed to referees, in this court.

The Court: This court cannot sit here and try a complicated matter like this; it would take a week, probably, to try this case, and it would not be doing its duty to the public to occupy the length of time necessary.

Mr. Hamilton: It is like any other case for trial.

The Court: There are questions to be determined here that should be tried before a referee.

Mr. Brumback: It occurs to me that the court should fix some time within which one of these bonds should be filed.

The Court: I will fix the time, if you cannot agree.

Mr. Brumback: If there is going to be a bond filed, we want to know it; and if not, we want the court to appoint a receiver, and that ought to be within a short time.

Mr. Hamilton: We will make our exceptions, and the court can fix the amount of the bond and its conditions and the parties to whom it shall be given.

The Court: Of course I can do that.

Mr. Hamilton: Of course I had intended to file an amended answer, fully setting up, in better form, perhaps what is already before the court—the claim made by Mr. Squire, that, since he has had this property, there has been large advances and investments made by him. The court has not said much about that question, and I think it is quite important in this matter, that where he has been in possession of this property and advanced money out of his own pocket, that that should be taken into consideration.

The Court: As a matter of course he should be protected in every cent of his advances.

Mr. Hamilton: I have, personally, no objection to a reference in this case, but, if the court appoints a referee, of course the accounts will be submitted to the referee.

Mr. Brumback: There will be no difficulty about that.

Mr. Hamilton: Accounts have been kept of this property. Mr. Jay never came into this case until he supposed it would be profitable. I have got some authorities to submit to the court upon this point.

Mr. Brumback: And we have got some letters. There ought to be a time fixed within which they should file a bond.

Mr. Hamilton: That can be fixed in the journal entry.

The Court: I do not want to do anything harsh; I want to do what is fair and reasonable between the parties.

Mr. Hamilton: The court makes the order: First, that Mr. Squire file an account; Second, that a referee be appointed; Third, that Mr. Squire be required to give a bond; and denies the application for a receiver?

The Court: As to the application for a receiver—of course, if he does not do these things then—

Mr. Hamilton: Then it can be brought up afterwards.

The Court: If he does not comply with the orders.

Mr. Hamilton: I suppose, of course, that Mr. Squire can give a bond, but it is a novel thing to me precisely how that bond is going to work.

Mr. Brumback: We have heard about Mr. Squire's being solvent, and, since this hearing, we have had some one looking him up, and every piece of property that we have found on the duplicate has been transferred to his wife, and we have found a good deal of it. There is no evidence that he is solvent, only what these gentlemen have said.

The Court: Of course there is no evidence before the court. There is no use of talking outside of what appears before me here now.

Mr. Brumback: It seems to me that it is absolutely and entirely just, as to all the parties now, that this business should be carried out speedily. I think the court should fix the amount of the bond, because we probably cannot agree upon it, and also the time within which it should be filed.

The Court: I think the bond can be given within three days, as well as three months.

Mr. Hamilton: Mr. Squire is not in the city to-day.

Mr. Brumback: We will give you three days, or five days, according to the suggestion of the court.

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Mr. Hamilton: We are not asking you to give us time. Mr. Squire is out of the city.

The Court: I will give them five days, and, of course, if there is any special reason why he cannot do it in that time, I will extend the time. He is receiving now about \$2,000 a month. Nobody knows how long that will continue.

Mr. Brumback: He is receiving about \$4,000 a month.

The Court: No: six times four is twenty-four.

Mr. Brumback: Look at the later receipts. They were increased.

The Court: \$408 for May.

Mr. Hamilton: He is not receiving that.

The Court: He is paying out of that.

Mr. Brumback: He is getting \$4,000 a month.

Mr. Hamilton: I suppose sometimes more and sometimes less. He has to put down wells.

Mr. Brumback: He is not paying for these wells that he is putting down. We are going to come in with an application on this subject before we quit.

The Court: He received in April, for himself, \$2,500, and he had to pay \$200 of that to Mr. Noble. That would be \$2,300 that he received for the purpose of running the concern. Of course we expect that he would have to pay out the expenses, whatever they are. And in May, he received \$2,000, substantially, out of which he had to pay \$200. That is not taking into account the royalty. In March, he received about \$2,000, and he is receiving and disbursing aside from Mr. Noble, probably about \$2,000 per month. I think he should give a bond for \$10,000.

Mr. Hamilton: To each one of these people?

The Court: No: I think the bond should be given to the clerk of the court, for the benefit of whom it might concern.

Mr. Hamilton: And that Mr. Squire, should pay over to these people the amount found due them, if there is any?

The Court: That he should pay over to the parties such an amount as upon a final settlement of the account there should be found due them.

Mr. Hamilton: The court don't express any opinion as to whether there is anything due them?

The Court: No, sir.

Mr. Hamilton: The court has found that there is a probability that they have some interest?

The Court: Yes, So far as a referee is concerned, I will appoint a referee unless the gentlemen can agree upon it, or I will do this: I will furnish a lot of names and you can strike them off until you get down to one; I will furnish five names, that is the way Judge Pugsley gets out of it. (The Court here mentioned some names, but counsel said they were not ready to strike them at this time.)

I will overrule Mr. Noble's motion to let him out; that motion will be overruled.

(Counsel for Mr. Noble noted an exception to the overruling of said motion.)

EXECUTORS AND ADMINISTRATORS.

[Clark Probate Court.]

EXCEPTIONS TO ACCOUNT OF JOHN W. ELLIS, ADMR.

1. In the distribution of property the strict rules of law should be moderated by the doctrines of equity, where a strict application of the former would work obvious injustice.
2. A debt owing to the estate by a distributee is an asset of the estate and the same should be charged to the distributee and retained by the administrator out of the share of such distributee.
3. Where the testator became surety for a distributee on a promissory note, and judgment was recovered on the note against both the principal and surety, and both are dead without execution having issued on the judgment, the amount of such judgment may be retained by the administrator out of the share of the distributee, as well as the amount of a note given by the distributee to the testator.

ROCKEL, J.

In the second account filed herein, the administrator charges the administrator of a deceased heir, with a note which the heir owed the father, and also with liability incurred by the father as surety of the heir. The administrator of the deceased heir objects that these amounts should be deducted out of the distributive share of the heir, and insists that the same should be paid to him, and then the administrator of the father should present the claims to him for allowance or rejection as the case might require.

The note was executed by Ellis, Jr., to Ellis, Sr., in 1874. In 1879, Ellis, Sr., made a will, which gave all his property to his wife during her natural life, and after her death the real estate was to be sold and the proceeds of that as well as the personalty divided equally among his children.

In January, 1881, the note upon which Ellis, Sr. was surety for Ellis, Jr., was executed, and in July of the same year, Ellis, Sr., died. In July, 1889, judgment was recovered against Ellis, Jr., as principal, and the estate of Ellis, Sr., as surety, and in January, 1891, Ellis, Jr., died without having satisfied either the judgment against him and his father's estate, or having paid the note due the said estate, nor was there ever any execution issued on the judgment. In February, 1891, the widow of Ellis, Sr., died. The court of common pleas in construing the will, held that Ellis, Jr., held an interest in the estate that vested at the time of his father's, and not the widow's death. The judgment against Ellis, Jr., upon which the father was surety, was not paid by the son's administrator, for the reason that there was no money in his hands to pay the same. The costs of administration, funeral expenses, and the widow's allowance, will take all of the estate of Ellis, Jr., so that, even if the distributive share coming to him is paid his administrator, there should be nothing left for general creditors, or if anything, but a very small per cent. Therefore, if in this case the administrator of the father's estate can not retain the amount owing the estate from the son on the note given by him to his father, and also the amount of the judgment against the son as principal and the estate of the father as surety, the father's estate will certainly lose the sum so paid. Neither one of those claims are advancements within the meaning of the law. It is not seriously contended by the son's administrator, that the amount on the note to the father's estate

should not be deducted from his distributive share. But as to the liability of the father's estate, as surety for the son, it is claimed that the father's estate not paying said judgment and no execution having been issued against the son on the judgment during his life-time, and a return made that it could not be collected from him, and thus the liability of the father's estate become fixed during the life of the son, that no cause of action or demand against the son existed at his death, which could be a proper subject of a set-off. In support of this claim he cites *Granger's Admr. v. Granger*, 6 O., 35, where in the opinion (42), it is said: "The next question propounded to us is: In a suit by an administrator, upon his intestate's claim, can the defendant set off a demand for money paid after the death of the intestate upon a liability entered into by the defendant, as surety for the intestate? Our judgment resolves the question in the negative. No cause of action or demand against the intestate existed against the intestate at his death. A liability only was incurred, upon which, on the contingency of the security being compelled to pay for the intestate, he would have a right of action for his indemnity. A bare possibility, that in a certain future contingent event, he would have a demand, is not a debt due from the intestate, and such claim has not the mutuality required for a set-off. Such a demand, though good against the estate, can only look to the general assets for satisfaction. To allow it to be off-set, would change the course of distribution of intestate estate."

Whether or not this decision is applicable to the present statute upon the subject, I am not prepared to say, or whether the same would now be considered as good law, but it is certainly true, that the weakness of the reasoning of the court for its conclusion is about on a par with its injustice.

In *Follett, Admr., v. Borger*, 4 O. S., 586, at 592, it was said: "That a mere contingent liability,—not even reduced into judgment,—as surety for the assignor, is not a demand upon him, would seem to be sufficiently obvious; and where nothing more exists at the date of the assignment, and the assignor is solvent, a subsequent payment of the surety, in discharge of such liability, will not give him a right of set-off as against the assignee."

This as much as intimates that if the liability had been reduced to judgment, or if the assignor was insolvent, both of which conditions exist in the present case the decision might be different.

The case of *Fuller v. Stieglitz*, 27 O. S., 355, seems, however, to apply the same rule where the assignor is insolvent. But there are several reasons why the doctrines enunciated and following in those cases should not be applied to the case at bar, where the harsh and sometimes unjust rules of the common law are applied. The settlement and distribution of estates falls peculiarly within the province of a court of equity where less stringent rules are enforced and more equitable doctrines promulgated. That there is such a distinction, the following from *Baker v. Kinsey*, 41 O. S., 408, at 409, fully substantiates. The situation was this: "Baker was in danger of losing his entire debt for which the three notes were given, on account of the insolvency of the makers. At the same time he was in danger of being compelled to pay the debt due to one of those makers. The injustice of allowing this is manifest, and gives rise to an equity in his favor to insist on a set-off, notwithstanding he has no such right at law. (*Pond v. Smith*, 4 Conn., 297). Prior to the code system a court of chancery enforced this right. Under the

code, sec. 5071, Rev. Stat., defenses legal and equitable are preserved. And sec. 5076, Rev. Stat., provides for making a new party, if necessary, to a final decision upon a set-off, if, owing to the insolvency or non-residence of the plaintiff, or other cause, the defendant will be in danger of losing his claim, unless permitted to use it as a set-off. This provision refers exclusively to an equitable set-off, and seems to recognize the precise equity we are considering." In the recent case of *Armstrong, Receiver, v. Warner*, 49 O. S., 376, it is said (at p. 388): "The remedy of set-off has been much enlarged in equity, and is there administered in cases, where, under the strict rules at law, it would not be available."

In *Pomeroy's Equity*, 541, occurs the following:

"A legacy from a creditor to his debtor, unaccompanied by language in the will, or exterior to it, expressly showing the special intent, whether equal or greater, or less than the debt, raises no presumption whatever, either of law or of fact, that the testator intended thereby to excuse, release, or discharge the debt, so that the legatee would be entitled to claim and receive the whole amount bequeathed, but would be freed from all liability to pay the debt. * * *

"A court of equity, in order to prevent this circuitry of action, may permit the executors to set off the debt against the demand made on them for the legacy."

In *Woerner Am. Law of Administration*, we find that (sec. 564) "The indebtedness of a legatee or distributee constitutes assets of the estate which it is the duty of the administrator or executor to collect for the benefit of the creditors, legatees and distributees. Hence, such indebtedness may be deducted from any legacy or distributive share of the debtor. * * *

"The right of set-off exists whether the legatee or distributee was indebted to the deceased before his death, or contracted a liability to the estate, or even the administrator personally, thereafter. So it is held that a son is not entitled to receive his distributive share of his father's estate, where the father was surety for him in an amount greater than the face value of said share, although the executor did not pay the surety debt until after action brought by the son." And even where under similar circumstances, the administrator for whom the testator stood as surety, was in default, the executor was held right in refusing to pay the legacy to such administrator until the contingent liability was discharged. *Sproul's Appeal*, 105 Pa. St., 442."

The position of these eminent authorities amply sustains the administrator of *Ellis, Sr.*, in charging to the distributive share of *Ellis, Jr.*, the amount of the note which he owed his father, and also the amount of the note and judgment upon which *Ellis, Sr.* stood as surety for *Ellis, Jr.*

To do otherwise would not result in the meeting of justice and equity which ought always in such cases to prevail

It was the intention of the testator in this case, as it always is, at law, that the heirs should share equally.

The note that the administrator of *Ellis, Sr.*'s estate held against *Ellis, Jr.*'s, should be charged up as assets of the estate at its full amount.

All questions as to jurisdiction in this cause have been waived.

W. A. Scott, for admr. of *Ellis, Sr.*

H. B. Rannels, for admr. of *Ellis, Jr.*

EMINENT DOMAIN—ESTOPPEL—CO-TENANT.

[Franklin Common Pleas.]

SAMUEL G. GARVIN v. COLUMBUS (CITY).

1. The passage and publication of an ordinance to widen and extend a certain street and condemn and appropriate for that purpose certain described real estate, does not constitute an appropriation to public use, until statutory provisions have been strictly complied with and proceedings had in court.
2. A mortgagee, before condition broken, is an owner within the meaning of sec. 2237, Rev. Stat., which requires notice, "to all the owners of the property sought to be appropriated, resident of the state, whose place of residence is known."
3. The acceptance by a joint owner, of money paid into probate court, for property appropriated for a public street, does not estop his co-tenant from questioning the validity of the appropriation proceedings, as a part owner cannot by grant or estoppel create an easement in land against his co-tenant.

BIGGER, J.

This action is one for the recovery of real property, the petition being framed in accordance with sec. 5781, Rev. Stat., and alleges that plaintiff is the owner and seized in fee simple of certain property located in the city of Columbus, and described as the south half of lot No. 33, of Sullivan's Second Addition to the town of Franklinton, now city of Columbus; that the plaintiff is entitled to the possession of the premises, and that the defendant, the city of Columbus, unlawfully keeps him out of the possession of, and has so kept him out of the possession thereof, since January 30, 1892, of a portion of said premises described as parcel six, a strip of ground off the south side of said lot No. 33, and being 34.30 feet wide at the west end thereof and 34.68 feet wide at the east end thereof. The plaintiff prays for judgment against the defendant for the recovery of the said strip of land, and also for damages in the sum of five hundred dollars.

The defendant, for answer, denies each and every allegation contained in the petition. Further answering, the defendant alleges that on and prior to the eighteenth day of August, 1890, one Joseph Quinn, Sr., was the owner of the premises described in the petition; that on said eighteenth day of August, 1890, the defendant duly passed an ordinance of which the following is a copy, omitting the description of other parcels of land not involved in this case:

"An Ordinance, No. 5732, to widen and extend Rich street 62 feet wide from Gift street to Sandusky street.

"Section 1. Be it ordained by the city council of the city of Columbus, Ohio, That it is deemed necessary to and said council does hereby widen and extend Rich street 62 feet wide from Gift street to Sandusky street.

"Section 2. That the said city council hereby condemns and appropriates to the public use for street purposes to widen and extend Rich street 62 feet wide from Gift street to Sandusky street, the following described real estate, to-wit: * * * A strip of ground off the south side of lot No. 33, Sullivan's Addition to Franklinton, being 34.30 feet wide at the west end and 34.68 feet wide at the east end, owned by Joseph Quinn, Sr.

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"Section 3. That this ordinance shall take effect and be force from and after its passage and publication, according to law."

It is alleged that this ordinance was published in the Ohio State Journal, a newspaper of general circulation in Franklin county, Ohio, on August 20 and 21, 1890; that the ordinance went into effect and the premises herein described became the property of the defendant on August 31, 1890, and that it has been at all times since said date, and now is, the property of the defendant for the uses and purposes aforesaid, and that the plaintiff had notice of all of the aforesaid proceedings. It is then alleged that on June 2, 1891, the defendant began proceedings in the probate court of Franklin county, to assess the compensation to be paid for the premises appropriated by the ordinance of August 18, 1890; that thereafter such proceedings were had in the probate court that the sum of \$800 was awarded to the owner of the premises; that on January 29, 1892, the defendant deposited with the probate judge of Franklin county, the sum of \$800 so awarded for the use of the owner of the premises; that thereupon the defendant took possession of the premises, and ever since has been and now is in possession thereof for the uses and purposes for which it was appropriated, and that on January 30, 1892, the probate judge paid the said sum of \$800 to Joseph Quinn, Sr., and Edmund M. Stanley; that the defendant is now the owner of the premises described, and that the plaintiff has no title or interest therein.

The plaintiff replies, admitting the commencement of the proceedings to assess compensation in June, 1891, and that the defendant took possession of the premises and is now in possession thereof, but denies all of the remaining allegations of the answer. The plaintiff then alleges that he became the owner of the premises described by deed from the sheriff of Franklin county of date July 16, 1896, which deed conveyed the property to the plaintiff in fee simple, and that plaintiff is still the owner thereof. The plaintiff alleges that he never received the \$800 awarded to the owner of the premises, or any part thereof.

The case has been submitted to the court upon an agreed statement of facts, reserving the question of damages for future determination by a jury. The facts agreed upon are substantially as follows: that the plaintiff, Garvin, is, and was at all times mentioned in the petition, a resident of Portsmouth, Ohio; that the defendant, the city of Columbus, passed the ordinance set out in its answer on August 18, 1890; that the ordinance was published in the Ohio State Journal, a newspaper of general circulation in the county of Franklin, on August 20 and 21, 1890; that the said ordinance went into effect on August 31, 1890; that the plaintiff was never given actual notice of the introduction or passage of the said ordinance, and that no other notice was given the plaintiff except that contained in the records of the city council and the publication referred to in the Ohio State Journal; that the title to the real estate mentioned in the petition prior to October 20, 1890, was in Joseph Quinn, Sr.; that on October 20, 1890, the said Quinn and wife, for a valuable consideration, sold and conveyed to Edmund M. Stanley and William Hayden, Sr., the said south half of lot 33, described in the petition, which deed of conveyance was filed in the recorder's office and recorded on November 23, 1890; that on October 20, 1890, the said Stanley and Hayden executed a mortgage to plaintiff to secure a promissory note for \$1,000 on the premises described, and that this mortgage was filed in the recorder's office and recorded on November 25, 1890; that the city solicitor of the city of Columbus, filed an application to assess compensa-

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tion in the probate court of Franklin county, on June 2, 1891, and that Joseph Quinn, Sr, et al., were made parties, but neither Stanley and Hayden nor the plaintiff were made parties; that such proceedings were had in the probate court, that a jury was impaneled and sworn and that the jury rendered a verdict in favor of Joseph Quinn, Sr., as owner of tract No. 6, for the sum of \$800; that the said sum of \$800 was deposited by the defendant with the probate judge, who, on January 30, 1892, paid the same to Quinn and Stanley; that the defendant thereupon took possession of the strip of land described in the petition and has been ever since in possession thereof; that the plaintiff was not a party to the action in the probate court and did not receive any part of the \$800 so awarded; that the plaintiff brought an action in 1896, against Stanley and wife, and Hayden and wife, to foreclose his mortgage; that as a result of the said action the plaintiff recovered on April 17, 1896, a judgment for \$1,456.29, and said mortgage was also foreclosed and the premises ordered to be sold and the proceeds applied to the satisfaction of plaintiff's judgment; that the premises were afterwards sold by the sheriff and bid in by the plaintiff for the sum of \$484, and the sale was confirmed by the court; that in pursuance of the order of the court the sheriff executed and delivered a deed in fee simple to the plaintiff for the said south half of lot 33, of Sullivan's Addition to the town of Franklinton, now city of Columbus.

The plaintiff in this action, as appears from the agreed statement of facts, has a clear title to this property and the right to its possession, unless the city asserts a paramount title. Do the facts disclosed in the agreed statement of facts, show that the city of Columbus has a title paramount to that of the plaintiff and which will defeat plaintiff's action to recover possession of this property?

The right of eminent domain is one which inheres in the sovereignty of the state, but which may be delegated and has been delegated to municipal corporations for the purpose of condemning and appropriating land for street purposes. The city in this case claims that the appropriation of the land was complete upon the passage and publication of the ordinance according to law. No question is made as to the regularity of the passage and publication of the ordinance. The vital question in this case is, as I view it, does the passage and publication of an ordinance such as was passed and published in this case, constitute an appropriation of the land to public use without more, or are the proceedings in court a necessary and indispensable part of the proceedings to appropriate land for the use of streets? This question does not seem to have been directly presented for decision in any reported case in this state.

The provisions of the constitution upon this subject are contained in sec. 19, of art. 1, and sec. 5 of art. 13. Section 19 of art. 1 reads: "Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads which shall be open to the public without charge, a compensation shall be made to the owner in money, and in all other cases where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained

by a jury of twelve men in a court of record, as shall be prescribed by law."

It will be observed that by the terms of sec. 19, of art. 1, the compensation to be made for private property taken for public use, is not required to be made before the property is taken in two cases: First, where the property is taken in time of war, or other public exigency, imperatively requiring its immediate seizure, and, second, for the purpose of making and repairing roads which shall be open to the public without charge. So that in so far as the restrictions imposed upon the right of eminent domain by the constitution are concerned, the compensation to be made for land taken for street purposes need not first be made unless the language of sec. 5, of art. 13, is to be taken as applying to municipal corporations. That it is not to be so applied is decided by the Supreme Court in *Toledo v. Preston*, 50 O. S., 361.

But the constitution does not undertake to provide for the mode of procedure to appropriate private property to public use. The constitution simply bounds and limits the exercise of the right of eminent domain. The mode of procedure to appropriate property to public use, is provided by legislative enactment. While the constitution would permit the appropriation of private property by a municipal corporation for street purposes without first making compensation to the owner, we must look to the statutory provisions upon the subject to determine whether the legislature has provided that private property may be taken without first making compensation. The question under consideration by the Supreme Court, in *Toledo v. Preston*, *supra*, was, whether sec. 2321, Rev. Stat., which authorizes the postponement of the assessment of damages for injuries to abutting property in the case of street improvements, was a violation of the constitutional limitations upon the exercise of the right to appropriate private property for the use of streets, and the court held that it was not. But there is no such provision of law upon the subject of the appropriation of land for the use of streets. The statutory provisions upon this subject are found in Div. 7, chap. 3, of the law relating of municipal corporations. Section 2233, Rev. Stat., provides for a preliminary declaration by resolution of the council of the intent to appropriate the property. Section 2236, Rev. Stat., related to the application to court, describing the property and the object proposed. Section 2337, Rev. Stat., relates to service of notice upon the owners of the property sought to be appropriated. Then follow the provisions governing the proceedings in court.

It appears from the agreed statement of facts that there was no preliminary resolution declaring the intention to appropriate the property in this case, unless it is to be considered as embodied in the ordinance passed on August 18, 1890. But that such resolution is not necessary was decided in *Tyler v. Columbus*, 3 Ohio Circ. Dec., 427, by the circuit court of this county. It was held in that case, that "where a city council deems it necessary to condemn private property for street purposes it must proceed under sec. 2642, Rev. Stat., and no preliminary resolution such as provided in sec. 2235, or 2304, Rev. Stat., is necessary."

Section 2642, Rev. Stat., provides "When it is deemed necessary by the council of any municipal incorporation to open, extend, straighten, narrow or widen any street, alley or public highway, within the limits of such corporation, the council shall provide by ordinance for the same. Such ordinance shall briefly and in general terms describe the property,

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if any, to be appropriated for such purposes; and the proceedings for such appropriation shall be as provided in chap. 3, div. 7, of this title."

Now, the proceedings provided in chap. 3, div. 7, begin with sec. 2235, Rev. Stat., which provides for the preliminary resolution declaring the intent to appropriate and which the court held was not necessary. Then following that, the remaining sections of the chapter relate to the proceedings in court. The language of sec. 2642, Rev. Stat., that the "proceedings for such appropriation shall be as provided in chap. 3, div. 7, of this title," must relate to the proceedings in court, and seems to make such proceedings an essential step in proceedings to appropriate private property for street purposes. This legislative intent is further evidenced by the provision of sec. 2642, that the "ordinance shall briefly and in general terms describe the property, if any, to be appropriated" while sec. 2236 provides, that the application to the court "shall describe as correctly as possible the property to be taken." Certainly it was not the legislative intention that private property might be taken against the will of the owner by a brief and general description. It is also to be observed, that sec. 2236 and sec. 2244, refer to the property, not as the property taken, but as the property to be taken. Secs. 2236 and 2243, refer to it as the property "sought to be appropriated." Throughout the statutory provisions relating to the proceedings in court, the property is referred to as the property to be taken. Furthermore, sec. 2245, provides that where a building stands partly upon the land sought to be taken and partly upon adjoining land, that the title to such building shall be determined by the proceedings in court. Section 2248 provides, that the "court may direct the time and manner in which possession of the property condemned shall be taken or delivered." Section 2253 provides, that upon prosecution of proceedings in error the court may suspend the execution of any order made in the case pending the proceedings in error and may require a bond for the payment of damages and costs occasioned by such proceedings, and then provides that "in all cases, whether upon error or upon appeal, as provided for in sec. 2254, where the municipal corporation pays or secures by a deposit of money, the compensation assessed by the jury and gives such security as may be deemed adequate to pay any further compensation and all damages and costs which may be thereafter adjudged, the right to take and hold the property condemned shall not be affected by any such review or appeal." It would seem from this language, that the right to take and hold the property did not arise until the compensation had been assessed by the jury.

From the foregoing considerations, it seems clear that the proceedings in court are a necessary part of the steps to be taken by a municipal corporation to appropriate private property for street purposes. If this be a correct construction of the law, then before the city can hold this property, it must appear that it strictly complied with the statutory requirements upon the subject, because such proceedings being in derogation of the rights of the individual, must be strictly complied with. This was expressly decided in the case of Harbeck v. Toledo, 11 O. S., 219. The syllabus of that case is as follows: "The power conferred upon a municipal corporation to take private property for public use must be strictly followed, and therefore, where the statute required the corporation, as a substitute for personal service upon the owners, to publish a copy of the application with a statement of the time and place at which it is to be made, the publication of a notice of the time and place for mak-

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ing the application, describing therein the property and the purpose for which it is to be taken, but not accompanied by a copy of the application, is not a compliance with this statutory pre-requisite, and does not confer upon the court or judge authority to make an order appropriating the lands." The only difference between the statute then in force upon the subject of notice and that now provided by sec. 2237, is, that sec. 2237 only requires the substance of the application to be set out in the notice, while under the statute then in force, a copy of the application was required to be set out and it was for a failure to include in the published notice a copy of the application that the Supreme Court held in that case that there was no valid appropriation of the land, because the court had no jurisdiction. It is true, that at the time of the decision of the case of Harbeck v. Toledo, *supra*, there was no statute providing for an ordinance as is now provided by sec. 2642, but as I have shown, compliance with this section does not seem of itself to be sufficient to constitute an appropriation of the property.

Applying this rule then to the facts of this case, it appears that there was no notice such as is provided in sec. 2237, to the owners of this property. Neither Stanley nor Hayden, who were tenants in common of this land, were made parties in the probate court, and the verdict of the jury was in favor of Quinn, as owner of the land, while the facts show that he had no ownership in the land at the time of the proceedings in court. The plaintiff, who held a mortgage upon the land, was not made a party and had no notice of the proceedings. Section 2237, requires notice to all the owners of the property sought to be appropriated resident in the state whose place of residence is known and to all others by publication. The deed of Quinn to Stanley and Hayden, was of record, as was also the mortgage of the plaintiff in this action, and was notice to the city of their ownership of the premises. The plaintiff in this action claims that he was an owner within the meaning of this section at the time of the proceedings in the probate court, and cites as authority the decision in Harrison v. Village, 1 Ohio Circ. Dec., 30, in which case the court held, that "a mortgagee whose mortgage is duly recorded is an owner within the meaning of this section, and is entitled to notice." The city contends, however, that as the proceedings in court were had before the condition in the mortgage was broken, that the mortgagee had no title at that time and, therefore, has no right now to recover possession of the land. The position of the city is, that the plaintiff has mistaken his remedy, and that, if he has any remedy at all, it is an action for damages, and not to recover possession of the land. It is pointed out that the rule is, that where land is taken for public use by condemnation and appropriation proceedings, that the lien of the mortgage is transferred to the fund arising from such proceedings, and that it is his right to have the money in place of the land, and suggests that his only remedy is, to pursue this fund which it appear was paid to Quinn and Stanley long before he had any knowledge of the appropriation proceedings. But it seems to me that it would be an anomalous proceeding if the city, in a purely *ex-parte* proceeding, neither the legal nor equitable owners of the land being in court, although known to the city, could assess the compensation and compel the mortgagee to accept a fund so created in lieu of his interest in the land. It is to be observed, too, that the court in the case of Harrison v. Village, *supra*, did not restrict the right of the mortgagee to notice as is contended by the city. The only condition imposed was,

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that the mortgage should be recorded, and not that the conditions should be broken. But however that may be, I regard it as unimportant to the decision of this case. The plaintiff in this case by the proceedings in foreclosure, has succeeded to all the rights of Stanley and Hayden in this property. It is probably true, that Stanley by accepting the money paid into court estopped himself to question the validity of the appropriation proceedings, but his co-tenant, Hayden, was not estopped by Stanley's acceptance of the money, because a part owner cannot either by grant or estoppel create an easement in land against his co-tenant. This question is clearly settled in the case of *Thomason v. City of Dayton*, 40 O. S., 63. The city, therefore, having obtained no right to an easement against Hayden, cannot assert this right against the plaintiff who has succeeded to all Hayden's rights.

My attention has been called to a decision by Judge Sayler, of the Hamilton county common pleas court, in which he seems to hold that the passage and publication of the ordinance constitutes a complete appropriation of the property and he seems to rest his decision upon the case of *Toledo v. Preston*, *supra*. I have already pointed out, however, that the case of *Toledo v. Preston*, *supra*, was a case of damages resulting from the improvement of the street to abutting property, and not an appropriation of property for the use of streets, and in that case it is expressly provided that the assessment of damages may be postponed until after the improvement is made. But, clearly, that section only applies to the case of assessment of damages to abutting property resulting from the improvement of streets and alleys.

Upon the other hand, the superior court of Cincinnati, at General Term, decided that "the mere fact that city authorities have unlawfully appropriated private property for street purposes, does not estop the owner from recovering possession. Circumstances which would estop the owner in such case from recovering possession of the land would probably constitute a dedication thereof of public use." In the opinion of the court which was delivered by Judge Peck, it is said: "No case has come under our observation where it has been held that as against a public use there could be a right to compensation after the loss of the right to recover the land itself."

I am, therefore, of opinion that the city, not having complied strictly with the provisions of law relating to the appropriation of private property for street purposes, is not entitled to the easement claimed against this plaintiff, and that the plaintiff is entitled to the possession of the land.

Hon. D. J. Ryan and W. H. English, for plaintiff.
S. N. Owen and E. C. Ervine, for defendant.

HOMICIDE—EVIDENCE—MALICE.

[Lucas Common Pleas.]

STATE v. ALONZO BENNETT.

1. A reasonable doubt exists, if the material facts, without which guilt cannot be established, may fairly be reconciled with innocence.
2. Direct testimony is the positive statement, under oath, of a fact, by a credible eye-witness.
3. Circumstantial evidence is the positive proof of circumstances which necessarily or usually attend such facts.

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4. To convict in a criminal case, upon circumstantial evidence, each of the several circumstances relied upon to prove any essential element of the crime must be given by direct testimony, beyond a reasonable doubt; each, when all are taken together, must be consistent with all the others, and not inconsistent with any other established fact, and all taken together, must point surely and unerringly to the guilt of the defendant, and must be inconsistent with any other rational supposition than that the defendant is guilty of the offense charged.
5. Evidence of good character is admissible, not only to aid in determining whether the defendant is guilty, but also of what grade, where the offense charged consists of several grades.
6. Counsel must not comment upon the failure of defendant to testify in his own behalf, and such fact cannot be taken into consideration by the jury.
7. Malice in a legal sense, means a motive or purpose from which flows the act injurious to another person, and done intentionally and without lawful excuse.

PRATT, J.

Gentlemen of the Jury:—

The defendant, Alonzo Bennett, is on trial upon an indictment in due form of law found and returned by the grand jury of Lucas county, Ohio, charging him with the crime of murder in the first degree. This indictment charges that on December 13, 1897, at said county and state, said defendant Alonzo Bennett, unlawfully, purposely and of deliberate and premeditated malice, made an assault, in a menacing manner, upon one Martha J. Bennett, and with the intention unlawfully, purposely and of deliberate and premeditated malice to kill and murder said Martha J. Bennett, and that he, the said Alonzo Bennett, did then and there unlawfully, purposely and of deliberate and premeditated malice and with the intent aforesaid, cast, throw and push the said Martha J. Bennett into the Miami & Erie Canal, in said county, in which there was then and there a large quantity of water, by which said Martha J. Bennett, was then and there choked, suffocated and drowned, and of which she then and there instantly died. And the said indictment alleges that the said Alonzo Bennett, did then and there in that manner and by those means, unlawfully, purposely, and of deliberate and premeditated malice, kill and murder the said Martha J. Bennett.

The defendant, Alonzo Bennett, has been, in due form of law, arraigned and required to plead to this indictment, and has plead thereto "Not guilty." He has thereby put in issue each and every matter alleged in said indictment which is essential to constitute the crime of which he so stands charged.

Under the laws of the state of Ohio, there are three grades or degrees of homicide: First, murder in the first degree; second, murder in the second degree; third, manslaughter.

Whoever purposely and of deliberate and premeditated malice kills another, is guilty of murder in the first degree.

Whoever purposely and maliciously, but without deliberation or premeditation, kills another, is guilty of murder in the second degree.

Whoever unlawfully kills another in such manner or under such circumstances as not to constitute either murder in the first degree, or murder in the second degree, is guilty of manslaughter.

The charge here made in this indictment against the defendant Alonzo Bennett, of murder in the first degree, includes within itself the lesser offense of murder in the second degree and also the lesser offense of manslaughter. Therefore, the defendant, if not convicted of the crime of murder in the first degree, under this indictment, may, if the evidence shall warrant it, be acquitted of murder in the first degree and convicted of murder in the second degree, or he may, in like manner, be

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acquitted of murder in the first degree and also of murder in the second degree, and if the evidence shall warrant it, be convicted of the lesser offense of manslaughter. The charge of murder in the first degree as made in this indictment, is also broad enough to include the lesser offense of assault and battery. To unlawfully assault and strike or wound another, in a menacing manner, is to commit an assault and battery. Therefore, the defendant under this indictment, if the evidence shall warrant it, might be acquitted of all the other charges which I have named and be convicted of assault and battery only.

If the evidence before the jury shall not, when considered by you, under and in accordance with the rules of law which I will give you, warrant a verdict against the defendant Alonzo Bennett, for either murder in the first degree, murder in the second degree, manslaughter, or assault and battery, as I have defined them, then he should be acquitted of any offense.

The law presumes every man innocent of crime, and this presumption abides with him for his protection during the whole trial and until by due course of law he has been proven guilty of the offense for which he is then on trial, and with which he has been in due form of law charged, by evidence showing his guilt beyond a reasonable doubt; and in order for you to find this defendant guilty of either the charge of murder in the first degree, or in the second degree, or of manslaughter, or of assault and battery, you must find that every essential element of the offense of which you so find him guilty, has been proved to your satisfaction beyond a reasonable doubt, by the evidence introduced and which I have allowed to be given before you in this trial. To warrant a conviction for either of these offenses, the evidence must be such as to exclude every reasonable hypothesis but that of the defendant's guilt; as I have said, it must satisfy you of his guilt beyond a reasonable doubt; and in order that you may have before you clearly what is meant, in law, by the term "reasonable doubt" and what is meant by that term whenever I use it in the course of these instructions, I will before going further, define a reasonable doubt.

What is a reasonable doubt?

A verdict of guilty can never be returned without convincing evidence. The law is too humane to demand a conviction while a rational doubt remains in the minds of a jury. You will be justified, and are required to consider a reasonable doubt as existing, if the material facts, without which guilt can not be established, may fairly be reconciled with innocence. In human affairs absolute certainty is not always attainable. From the nature of things reasonable certainty is all that can be attained on many subjects. When a full and candid consideration of the evidence produces a conviction of guilt, and satisfies the mind to a reasonable certainty, a mere captious or ingenious artificial doubt is of no avail. You will look, then, to all the evidence, and if that satisfies you of the defendant's guilt, you must say so. If you are not fully satisfied, but find only that there are strong probabilities of guilt, your only safe course is to acquit.

The proof of a charge made in a criminal case involves two distinct propositions: First, that the act charged was done. Second, that it was done by the person charged. In order to convict, both these propositions must be established by evidence beyond a reasonable doubt. Either of them may be proven by direct testimony, or by circumstantial evidence. Direct testimony is the positive statement, under oath, of a

fact, by a credible eye-witness. Circumstantial evidence is the positive proof of circumstances which necessarily or usually attend such facts. In order to convict, in a criminal case, upon circumstantial evidence, each of the several circumstances relied upon to prove any essential element of the crime must be given by direct testimony beyond a reasonable doubt: each, when all are taken together, must be consistent with all the others, and not inconsistent with any other established fact, and all taken together must point surely and unerringly to the guilt of the defendant, and must be inconsistent with any other rational supposition than that the defendant is guilty of the offense charged.

In this case you are to inquire and determine, upon the evidence and under these rules which I give you:

1. Whether the crime here charged was committed as alleged?
2. If so committed, was it committed as alleged by this defendant,

Alonzo Bennett?

If the prosecution here has failed to establish by the evidence before you, either of these propositions to your satisfaction beyond a reasonable doubt, the defendant cannot be convicted. Was the deceased, Martha J. Bennett, assaulted, as charged. Was she pushed, cast or thrown into the water in the canal, and was she drowned by the water into which she was so thrown, cast or pushed? Or did she, by some accident, fall into the said water, or by her own voluntary act did she throw or cast herself into said water? Did she fall into the said water without any fault of any other person and without expectation on her part that she was to so fall: was it, in other words, a mere casualty resulting in her falling into the water and by which she was drowned? If so, it would be an accident. The term "suicide" is the same as that of "dying by one's own hand." Did said Martha J. Bennett, voluntarily, or of her own free will and purpose, throw or cast herself into the water with the intent by so doing to kill herself by drowning? Was it her own act that caused her death? If so, it would be suicide, or self-destruction, and in case her death resulted from accident, or from suicide, no criminal act was committed by any one.

The burden of proof is upon the state to sustain the proposition that the criminal act charged was committed by some person other than said Martha J. Bennett, as charged, by evidence that shall satisfy you of that fact beyond a reasonable doubt. The state must so prove that Martha J. Bennett came to her death in the manner charged by the unlawful act of another person. The true cause of her death must be clearly established. The possibility of reasonably accounting for the fact of her death by suicide, by accident, or by any natural cause, must be excluded by the circumstances proven, and it is only when no other hypothesis will explain all the conditions of the case and account for all the facts, that it can safely and justly be concluded that it was caused by intentional injury. If, however, upon all the evidence before you, full and fairly considered, under the rules which I give you, you find that the crime here charged was committed as charged, by the unlawful act of some person other than said Martha J. Bennett, then the next question for your determination will be: Is the defendant, Alonzo Bennett, the person who committed the offense charged? And in order to enable you to decide and determine whether this defendant is, or is not guilty, as charged in the indictment, I will now state to you the essential elements of each of the several offenses of which I have already advised you, the

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defendant may, if the evidence shall warrant it, be convicted under this indictment.

First:—Murder in the first degree. In order to convict the defendant, Alonzo Bennett, of murder in the first degree, as charged in this indictment, you must be satisfied from the evidence beyond a reasonable doubt, that on or about December 13, 1897, in the county of Lucas and state of Ohio, said defendant did, purposely and with deliberate and premeditated malice, push, cast or throw said Martha J. Bennett into the said Miami & Erie Canal in said county, and did thereby, then and there kill the said Martha J. Bennett by causing her to be drowned in the water then and there in said canal. If you so find the death of said Martha J. Bennett was then and there caused by drowning in the water so in said canal into which she was pushed, cast or thrown by the defendant then you will inquire whether he so purposely killed her. The purpose and intent to kill is an essential element of the crime of murder in the first degree. It is not sufficient to show an intent on his part to frighten or merely injure, or to produce any other result than her death, and the specific intent to kill must be shown. This is an invisible operation of the mind and is to be determined from the nature of the acts done by him and all the surrounding circumstances and conditions under which the same were done. The law presumes that every sane person intends to do that which is the natural and probable consequence of his voluntary acts. If one voluntarily does an act which has the direct tendency to destroy another's life, the natural conclusion is, that he intended to destroy the life of such person. If the defendant here voluntarily and purposely pushed, or threw, or cast the said Martha J. Bennett into the said canal, and there was then and there in said canal such a quantity or depth of water that the natural and probable result of his so doing would be to destroy her life by drowning, then the intention to kill her by drowning might reasonably be inferred, if it appear that he voluntarily and purposely did such an act. But it is for you, upon the evidence and from all the facts and circumstances proven before you, to determine whether the intent of the defendant, Alonzo Bennett, to kill the said Martha J. Bennett, as charged, may be fairly and reasonably inferred from all the facts proven. If you fail to find, beyond a reasonable doubt, upon all the evidence, and under the rules of law given you, that the defendant threw, pushed or cast said Martha J. Bennett into the water in said canal with the intent to kill her, you can not find the defendant guilty of murder in the first degree.

If, however, you find that she was so killed by the defendant, and that the killing was intentionally and purposely done, you will next inquire whether it was maliciously done: for to convict of murder in the first degree, the killing must not only be purposely and intentionally, but must also be maliciously done.

Malice, in a legal sense, means a motive or purpose from which flows the act injurious to another person, and done intentionally and without lawful excuse. Hatred, ill-will, hostility towards another, disposition or purpose to injure, may be shown by declarations or actions of the person committing the act. Malice also may be inferred from the fact of the killing, if it be done intentionally and purposely and without justification or excuse.

In this case, in order to determine whether the defendant— if you find that he intentionally and purposely killed Martha J. Bennett, in the manner and by the means charged—did so maliciously, you will consider

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the relations of the defendant to, and the state of his feelings towards said Martha J. Bennett, prior to and at the time of the said killing, together with the circumstances attending and motives for such act, and from all the circumstances as to such relations, feelings and motives as shown by the evidence before you, determine whether such killing was malicious.

To convict of murder in the first degree, it must also be shown that the defendant deliberated upon and premeditated the act of killing. If the defendant had actually formed the purpose maliciously to kill and deliberated and premeditated thereon, before he performed the act, the law fixes no length of time for the duration of such deliberation and premeditation: yet, it must appear that sufficient time for such deliberation and premeditation was had before the act of killing was by him done.

If, after a full and careful consideration of all the evidence before you, considered under the definitions and rules which I have stated, you are satisfied beyond a reasonable doubt, that on or about the time stated in the indictment, and in the county of Lucas and state of Ohio, the defendant purposely and with deliberate and premeditated malice, pushed, threw or cast said Martha J. Bennett into said canal and thereby, then and there caused her death by drowning her in the water in said canal, you will render a verdict against the defendant of guilty of murder in the first degree, as charged in the indictment.

If, however, you are not, after such consideration, so satisfied, you will then consider and determine whether the defendant is guilty of murder in the second degree. To convict the defendant of murder in the second degree, you must be satisfied from the evidence before you, beyond a reasonable doubt, that at or about the time and at the place stated in the indictment, the defendant purposely, intentionally and maliciously pushed, threw or cast said Martha J. Bennett, into said canal, where she was then killed by being drowned in the water in said canal.

To constitute the crime of murder in the second degree, the intent to kill and the malice are essential ingredients, but deliberation and premeditation are not essential. All that I have said in reference to murder in the first degree—except what has been said in reference to deliberation and premeditation—applies to the charge of murder in the second degree, and, with that exception, you will, if you come to the consideration of the question whether the defendant is guilty of the charge of murder in the second degree, apply to such charge, all that I have said in reference to the charge of murder in the first degree, the same as though I had repeated it here in full; and if, upon a full and fair consideration of all the evidence, you fail to find the defendant guilty of murder in the first degree, but are satisfied from the evidence, beyond a reasonable doubt, that at or about the date named, and at the place named in the indictment, the defendant purposely and maliciously killed the said Martha J. Bennett, in the manner charged in said indictment, you will render a verdict that the defendant is not guilty of murder in the first degree, but that he is guilty of murder in the second degree.

If you are not so satisfied beyond a reasonable doubt, then you will consider and determine whether the defendant is guilty of manslaughter. To convict the defendant of manslaughter, you must be satisfied from the evidence beyond a reasonable doubt, that at or about the time named in the indictment, at the county of Lucas and state of Ohio, the defendant unlawfully threw, pushed or cast the said Martha J. Bennett int:

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said canal and that she was thereby killed by being drowned in the water then and there, in said canal.

To constitute manslaughter, a purpose to kill is not essential, and malice is not essential. It is sufficient if the killing is unlawful; and any taking of human life, unless it is required or justified by law, or is excusable, is unlawful. Thus, if while one is engaged in the performance of an unlawful act, he unintentionally kills another he is guilty of manslaughter. So, if one unlawfully and intentionally kills another, but without malice, upon a sudden heat of passion, he is guilty of manslaughter. Where one unlawfully assaults another, and death results, although not intended, the assailant is guilty of manslaughter, because the killing is done by him while engaged in the commission of an unlawful act. So, also it is manslaughter, and manslaughter only, although an intent may be present, if, in case of a sudden quarrel, or by reason of any other excitement or impulse, without premeditation or malice, a sudden and unexpected conflict is precipitated, which alone prompts the assailant to commit the deed. The inquiry then is, did the defendant unlawfully kill the deceased, whether intentionally or unintentionally and without malice? If the killing was intentional and with deliberate and premeditated malice, it was murder in the first degree. If it was intentional and malicious, it was murder in the second degree. If it was unlawful, or without lawful excuse, but unintentional, or intentional without malice, it was manslaughter.

If in this case the defendant and Martha J. Bennett, at the time and place alleged in the indictment, became engaged in an altercation with the defendant, and the defendant unlawfully, but in the heat of sudden passion and without lawful excuse, assaulted said Martha J. Bennett, and in the making of such an assault and without lawful excuse for making the same, pushed, threw or cast her into said canal, and she was killed by being drowned by the water then and there in said canal, then he would be guilty of manslaughter, although there was no intention to kill her. But if his said act was not done intentionally, or while he was in the commission of an unlawful act, or, if it was done with lawful excuse on his part, then it was no crime whatever. If the deceased then and there assaulted the defendant and he, in his own defense, and if while using no more force on his part than was necessary for such defense of himself, and without any culpable negligence on his part, or reckless disregard by him of her safety she was accidentally cast, or thrown, or fell into the water in said canal, and there was no purpose or design on his part that such result should follow, then you cannot convict the defendant of any crime.

If, under these rules and upon the evidence, you do not find him guilty of murder either in the first or second degree, but do find him guilty of manslaughter, you will return your verdict accordingly.

If you fail to find him guilty of either of the grades of homicide as I have stated them, you may then consider and determine whether he is guilty of an unlawful assault. If she was killed by being drowned in the water of the canal, as the result of an unlawful assault made by him on her, he cannot be convicted of assault and battery only—he could only be convicted of assault and battery in case you should find from the evidence, beyond a reasonable doubt, that he unlawfully assaulted her in the manner alleged in the indictment and failed to find that she was killed by being drowned in the water of said canal, as in the indictment alleged.

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Evidence has been introduced on behalf of the defendant for the purpose of showing that, at and prior to the time when he is charged with having committed this offense his character for peaceable, and quiet and orderly conduct, was good. That evidence is proper and relevant, and should be considered by you in connection with all the other evidence in the case in determining whether or not the defendant is guilty of the offense charged, or any offense included within the charge. Evidence of good character is also admissible to aid the jury in ascertaining the grade of the crime, where the crime consists, as in this case, of various grades. Its weight is not confined to doubtful cases; it may of itself create a doubt. The degree of its force is to be determined by the attending circumstances and not by the grade of the offense charged. The reasonable effect of proof of good character is to raise a presumption that the accused was not likely to have committed the crime charged. The force of that presumption depends upon the strength of the opposing evidence to produce conviction of the truth of the charge. If the evidence establishing the charges of such a character is not upon principles of reason and good sense, to be overcome by the fact of good character, then the evidence of good character will be unavailing. Good character is no excuse for crime, but it is a fact bearing on the question of the defendant's guilt, which you will consider as you do all the other facts of the case, and give to it such weight as in your judgment, under all the circumstances, it is properly entitled to. If, after considering all the evidence, including the evidence as to good character, you entertain a reasonable doubt as to the defendant's guilt, then you must give him the benefit of that doubt, and say by your verdict that he is not guilty; but if after considering all the evidence, including the evidence as to good character, you are satisfied beyond a reasonable doubt that the defendant is guilty, then it is your duty by your verdict, to say that he is guilty, notwithstanding the evidence as to good character.

Counsel for defendant have requested me to give you the following and I do accordingly give them to you as a part of this charge:

1. The letter signed by "John and Mary Smith," the contents of which has been testified to by the witness, Cora Abrams, was only admissible in evidence to test the memory of the witness, and unless you find that the defendant wrote, or dictated, or in some way authorized that letter, you will not consider it as evidence in the case.

2. The contents of the letter which the testimony tends to show that the decedent, Martha J. Bennett, received at Findlay, on the eleventh, and took in her possession when she left the house of Mrs. Blake, on the afternoon of the thirteenth, is only competent to identify that letter as a paper in the possession of Mrs. Bennett which afterwards appears to have been in the possession of defendant. The contents of that letter is not important and will not be considered by you, unless you find that the defendant, Bennett, wrote that letter, or in some way was the author of it. Any other thing, whether it be an article or a written document, is only important to show that it was in her possession and that it afterwards came into the possession of defendant, and neither the contents of such article or such letter, is important except to identify it and in no ways competent to prove the facts contained in it.

3. During the closing argument of the prosecuting attorney in this case, objections were raised to statements made by him concerning want of testimony and calling attention to the jury how easy it would be to call witnesses to explain the scratch on the hand of defendant. The

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court now charges you that it was the right of defendant to go on the witness stand and testify in his own behalf; it was just as sacred a right for him not to testify, and if he does not testify there shall be no mention made of that fact on the trial of the case by the counsel upon either side; and I charge you now, to not consider in your deliberations as a circumstance in the case, the fact that he did not go upon the witness stand to testify."

In considering the evidence, you are the sole judges of the credibility of the witnesses. This applies to each and every witness in the case. In determining the degree of credit to be given to the witnesses and to each of them, you will consider who the witnesses are, their relations to the case, if any; their interest in the case, if they have any; their candor or want of candor in testifying; the opportunities which they had for observing, hearing or knowing what they claimed they saw or heard; the reasonableness or unreasonableness of their statements, the extent to which they are corroborated or contradicted, and all the circumstances under which their testimony was given. You will apply to the testimony your reason and judgment as intelligent, fair-minded men, and all the tests which your experience and good sense may suggest for the purpose of ascertaining the truth.

You will not permit your minds to be influenced by any considerations which are not warranted by the evidence, or which do not necessarily enter into the question of the guilt or innocence of the defendant. The solemn duty rests upon you and each and every one of you, to consider the evidence carefully and dispassionately under the rules which the court has given you, and declare by your verdict the truth—whether or not the defendant is guilty—without regard to any consequences that may result from your verdict to the defendant or to the state, or to any one else; and by so doing, and only by so doing, you will discharge the duty imposed upon you by the oath which you have taken as jurors to "well and truly try and true deliverance make between the state of Ohio and the prisoner at the bar."

If you are satisfied beyond a reasonable doubt, from a full and fair consideration of all the evidence before you, under the rules of law given you, that the defendant purposely and of deliberate and premeditated malice, killed Martha J. Bennett, in the manner charged in the indictment, you will render a verdict of guilty of murder in the first degree, as charged in the indictment.

By a recent amendment of the section of the statutes of this state, defining and providing for the punishment of the crime of murder in the first degree, the jury trying the accused may recommend him to mercy, and in such case the punishment, instead of being by death, shall be by imprisonment in the penitentiary during life; with the further provision, however, that no person convicted of murder in the first degree shall be recommended for pardon by the board of pardons, or for parole by the board of managers of the penitentiary, except upon proof of innocence established beyond a reasonable doubt. This provision of the statute as so amended, is now in force and applies to this case and in case you find the defendant guilty of murder in the first degree, you will then determine whether you will so recommend the defendant to mercy, and if you so determine you will so say by your verdict. If you are so satisfied and do not find the defendant guilty of murder in the first degree, but are satisfied beyond a reasonable doubt that the defendant purposely and maliciously killed the said Martha J. Bennett, in the manner charged in

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the indictment, you will render a verdict of guilty in the second degree. If you are not so satisfied that the defendant purposely and maliciously killed the said Martha J. Bennett, as charged in the indictment, but are satisfied, beyond a reasonable doubt that the defendant unlawfully killed her, in the manner charged, you will render a verdict of guilty of manslaughter. If you are not so satisfied that the defendant is guilty of either murder in the first degree, or murder in the second degree, or of manslaughter, but are satisfied beyond a reasonable doubt, that the defendant unlawfully inflicted personal violence upon the deceased as alleged, and are not satisfied beyond a reasonable doubt, that the defendant unlawfully inflicted personal violence upon the deceased as alleged, and are not satisfied beyond a reasonable doubt that such violence resulted in her death, in the manner alleged, you will render a verdict of guilty of assault and battery only.

If you are not satisfied beyond a reasonable doubt, that the defendant committed either of these offenses, you will then say by your verdict that the defendant is not guilty. You will be furnished with six blank verdicts: One, a verdict of guilty of murder in the first degree; another, a verdict of guilty of murder in the first degree with a recommendation to mercy; another, a verdict of guilty of murder in the second degree; another, a verdict of guilty of manslaughter; another, a verdict of guilty of assault and battery; and another, a verdict of not guilty.

When you have agreed upon your verdict, your foreman will sign the verdict upon which you so agree and you will then return it to the court.

Defendant by his counsel requested the court to give to the jury in charge the following request :

4. "The fact of an indictment being found against the defendant must not be considered by you and must not in any manner prejudice or influence your judgment; and, further, the mind of each juror must be convinced beyond a reasonable doubt of the guilt of defendant."

Said request was given to the jury, whereupon the jury retired.

RULE IN SHELLEY'S CASE—JUDICIAL SALE—QUIET TITLE.

[Montgomery Common Pleas.]

FLORA ARCHER ET AL. V. WILLIAM BROCKSCHMIDT.

1. Where, before the Rule in Shelley's Case was changed in its application to wills, by statute; a testator devised certain lands to his sons in fee simple, and by a later clause in the will explained that it was his intention that the sons should hold the property during their natural lives, so that neither of them could dispose of it for a longer time than the period of his lifetime, giving each of them only a life estate in the land and after their deaths the property to be to their respective heirs at law in fee simple: Held; That the later clause expressing the clear intention would prevail. The Rule in Shelley's Case would not apply and the devisees took only a life estate.
2. Where the devisee of such life estate conveys it by mortgage and upon foreclosure proceedings the court decreed, that the life estate of such devisee be advertised and sold according to law, which was done, but in the entry of distribution ordered a deed to the purchaser in fee simple: Held, That the life of the purchaser's deed is the decree and that the court could not on distribution enlarge or diminish the estate sold under that decree.

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3. The purchaser of such life estate at judicial sale, cannot enlarge the estate by buying the tax title and receiving an auditor's deed.
4. Proceedings to quiet title brought against "the heirs of P., deceased," do not estop the children of P., who was not deceased at the time of the proceedings, especially when they claim as devisees and not as heirs of P.

DUSTIN, J.

This is an action in ejectment brought by Flora Archer and William Earl Peaslee, as children and heirs at law of Edward A. Peaslee, deceased, against defendant, to recover possession of about twenty acres of land in Van Buren Township, adjoining the Lunatic Asylum, in this county. A jury was waived and the case submitted to the court. Both parties claim title through Aaron M. Peaslee, the grandfather of plaintiffs, who died testate in 1837, his will being admitted to probate in this county April 29, 1837.

The provisions of the will relating to the land in question are as follows: After making a devise in the first item of a certain tract, to his son Theo Peaslee, the second item provides:

"I devise to my son Edward A. Peaslee all the rest and residue of said tract of land as purchased of said Brown, and there being a site for a mill on the premises hereby devised to the said Edward, to be carried by the water of said branch, said Edward is to have the right as appurtenant to said tract, entering on the premises before devised to said Theodore, (if need be) for the purpose of making a race etc., to conduct the water to a mill to be erected on his land; the whole to the said Edward and his heirs in fee simple."

And in the conclusion of the will, immediately preceding the testamentary clause, occurs the following:

"I hereby in explanation declare it to be my will that the parcels of land hereinbefore devised to my two sons Theodore and Edward, is to be to them respectively during their natural lives, but so that they nor either of them cannot in their lifetime dispose of the same for any longer period than during their respective lives, giving each of them only a life estate in the land so devised to them, and after their deaths, the property to be to their respective heirs at law in fee simple."

Under this provision plaintiffs claim title as remainder-men, after the termination of the life estate of Edward A. Peaslee.

In 1850 Edward A. Peaslee executed a mortgage on the premises in question to John Erhard Schoenberger. In foreclosure of the same, a decree was entered for the sale of the life estate of Edward A. Peaslee, and same was so appraised at \$175, advertised and sold for \$140, but on confirmation of the sale, a deed in fee simple was ordered to the purchaser, S. M. Sullivan. The sale was March 29, 1851, confirmed May 9, 1851, and deed executed to S. M. Sullivan, assignee of J. W. Shank, who had purchased the premises at a tax sale, for \$6.53; the tax valuation being \$523.

Sullivan made a deed in fee simple to Geo. Nauwerth and he to John Jacob Dehn, and so the title progressed by deeds in fee simple to the defendant, who received a deed and entered into possession on July 8, 1885.

August 7, 1890, Brockschmidt, in order to get a loan upon the premises, brought an action to quiet his title against William A. Peaslee (brother of Edward A. Peaslee) and the unknown heirs of Edward A. Peaslee, deceased. Service was made by publication on all of the defendants, and in due course a decree was entered in favor of the plain-

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tiff, finding that he had the legal estate, and that none of the defendants had any estate, or was entitled to the possession in said premises or any part thereof, and quieting the title of plaintiff Brockschmidt. Meantime, Edward A. Peaslee, then a bachelor, having lost his property through the foreclosure proceedings, wandered away, and finally turned up in Fayette county, this state, where he settled in a small village called Waterloo, P. O. Pancoastburg, and in 1866 married. In 1874 he was divorced from his wife by whom he had two children, the plaintiff, Flora Archer, and a son who died. In July, 1874, he married again and in due course became the father of the plaintiffs William Earl Peaslee, and one other child who died.

Peaslee was an eccentric character, being a farmer, photographer, tinker and jack of all trades; but not very communicative. His widow knew little of his story, but among his effects were found papers leading to his identification as the long lost Edward A. Peaslee of Dayton. His photograph was also identified by a prominent citizen of Dayton, who knew him when he resided here, and saw him once, about ten or twelve years ago, when Peaslee was in this city on a brief visit.

So, it appears that at the time of the proceeding to quiet title brought by Brockschmidt, Peaslee was living.

Plaintiffs claim that, under the last provision of the will of Aaron M. Peaslee, they are remainder-men after the termination of the life estate of Edward A. Peaslee.

That although at the time of the probaton of said will, the rule in Shelley's case prevailed in Ohio, that the last explanatory and limiting clause of the will, under the decisions of our Supreme Court, notably *King v. Beck*, 15 O. 559, only a life estate was devised to Edward A., and the fee passed to his heirs at law, who have had the right of possession since 1893.

Defendant claims, 1st, under the foreclosure proceeding of *Schoenberger v. Edward A. Peaslee*, in which the final order of the court is that a deed in fee simple be delivered to the purchaser.

2d. Under the auditor's tax deed to Sullivan.

3d. By open, notorious and adverse possession for more than twenty-one years, and

4th. That plaintiffs are estopped by the proceeding to quiet title brought by defendant in 1890.

Plaintiffs reply, 1st, that the final order of the court to the sheriff to make a deed in fee simple to the purchaser for the premises, was void; because it could not vary from the decree which was the life of the deed; that the property having been decreed to be and having been appraised, advertised and sold as the life estate, the title could not be enlarged by the entry of the court on confirmation and distribution.

2d. That Sullivan being in the shoes of Edward A. Peaslee as a life tenant, and thereby bound to pay the taxes, and redeem the land if sold therefor, could not add to his estate by buying in the tax title.

3d. That the statute of limitations did not run against plaintiffs, whose title did not accrue until 1893, and

4th. That the proceedings to quiet title do not estop plaintiffs:

a. Because the statute only allows such proceedings against the heirs of deceased persons, and Peaslee was not at that time deceased.

b. Because defendants are improperly described as the heirs of Edward A. Peaslee, whereas they claim title as devisees of Aaron M. Peaslee, insisting that the description should identify not only the per-

sons but the quality of the claimant, in order to make the proceedings effective as *res judicata*.

The point is also made by the plaintiffs that under the answer of general denial, the proceedings to quiet title cannot be shown; that estoppel must be specially pleaded.

The case was tried January 11 to 13, 1897, but the questions raised were so numerous, important and interesting that considerable time has been given to their consideration.

OPINION.

The first and leading question is—

What kind of an estate is devised to Edward A. Peaslee by the will of his ancestor, Aaron M. Peaslee.

The words used in connection with the devise, and immediately following the description of the premises, viz.: "the whole to the said Edward and his heirs in fee simple" are clear enough, but what effect, if any, has the last explanatory clause in the will, viz.: "I hereby in explanation declare it to be my will that the parcels of land hereinbefore devised to my two sons Theodore and Edward, is to be to them, respectively during their natural lives, but so that they nor either of them cannot in their lifetime dispose of the same for any longer period than during their respective lives, giving each of them only a life estate in the land so devised to them, and after their deaths, the property to be in their respective heirs at law in fee simple."

It is clear enough here also by this elaborate explanation and the reiterated words of restriction that it was the intention of the testator to devise only a life estate to Edward and Theodore.

Following the familiar rule in the construction and interpretation of wills that the intention of the testator is to govern, and the other rule, that where two clauses are at variance, the latter shall prevail, there would be no difficulty in arriving at a conclusion, but for the point urged by the defendant that the rule in Shelley's case overrules the intention of the testator and makes this devise a fee simple and nothing else.

Volumes have been written on this celebrated rule, and decisions without number; and much learning has been expended in its interpretation.

1 Coke, 104, states the rule as follows: "When the ancestor by any gift or conveyance, taketh an estate of freehold, in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the heirs are words of limitation of the estate, and not words of purchase."

Counsel in this case have used the following definition from 12 O., 471: "Where a freehold is limited to one for life, and by the same instrument the inheritance is limited either mediately or immediately to his heirs or to the heirs of his body, the first taker takes the whole estate either in fee simple or fee tail, and the words 'heir or heirs of his body' are words of limitation, and not words of purchase."

This rule, as to the construction of wills, was abolished in Ohio, in 1840, Swans' Statute, page 999; sec. 5968, Rev. Stat.

As the will in question was probated and took effect in 1837 it is not controlled by this statute, and the rule in Shelley's case undoubtedly prevailed at that time

The Supreme Court of Ohio has recognized the rule, and applied it strictly to deeds; not so strictly to wills.

In *King v. Beck*, 15 Ohio, 559 a leading case on the subject in this state, Reid, J. says:

"In the construction of wills the intention of the testator must govern if it be not unlawful or inconsistent with the rules of law. The control over intention, by the rules of law, applies not to the construction of words, but the nature of the estate. A testator may use such words as he may please to convey his intention: and such intention, if clearly manifested, will be carried into effect, if it be not unlawful, and does not create an estate forbidden by law."

"The rule in *Shelley's* case is not a rule of construction, but a law of property. It is not designed to give a meaning to words, but to fix the nature and quantity of an estate. If the estate for life, created in the devisee or donee, is limited precisely as it would descend at law, the rule in *Shelley's* case vests the entire fee in the first devise or donee. The testator may use the word 'heir,' and take it without its usual legal sense, if he employ words respecting it to show that he did not use it in its ordinary legal sense, or if the plain intention manifested in the will shows that it was not employed in its usual legal sense. A mere presumed intention will not control its legal signification and operation; but with words of explanation, showing the manifest intent of the testator, it can be made a word of purchase. If, where the word 'heir' is used, there be superadded words of limitation, establishing a new succession, the first donee or devisee would take but a life estate. The expressed intent, then, of the testator, will affix the meaning to the word 'heir'—it is said a mere implication will not."

Judge Read seems not to have held in high esteem either the entailment of real estate, or the rule in *Shelley's* case. Of the former he says "That was only a family law in England designed to build up families, cheat creditors, and prevent forfeitures; and is in no wise consistent with the spirit and genius of our own government and laws, or the habits and feelings of our people." * * *

"Nor is there with us any disposition to strain a point to bring a case within the operation of the rule in *Shelley's* case, a rule which had its origin in feudal tenure, and was first adopted to secure the lords the profits and perquisites incident to inheritances; and, as an additional reason that it was necessary to prevent an abeyance of the fee. It is at best a mere artificial technicality; and just in proportion as it lacks reason, it appears to have won upon the affections of the profession. In its simplicity it possesses some sense, and to that extent we have adopted it as a rule of property in Ohio. But it is the high and imperative duty of this court to conform its judicial decisions, where we attempt to walk by the light of precedent from another country, to the nature of our government and free institutions."

"Throwing aside, then," the court continues, "all presumptions in favor of estates tail, and all peculiar affection for the rule in *Shelley's* case, and attempting to arrive at the intention from the language employed and the nature of the devises contained in the will, what must we say was the intention of the testator?"

The will in that case reads as follows:

"If it so pleases God, that at the time of my decease, I should be without any lawful heir or heirs, born in wedlock, in such case I will and bequeath all the property I may be possessed of before my decease, to

my brother Christian, without any reservation, to be used by him while he lives; and, if so please God, that, at the time of brother Christian's decease, he should be possessed of a legal heir or heirs, born in wedlock, I then will and bequeath all and every kind of property which might be considered mine, in my lifetime, and of which the said Christian may be seized at the time of his decease, to such heir or heirs, and no other. But should I myself die without lawful heirs, and also my brother Christian die without heirs born lawfully, as above stated, I then will what may be considered my share, after my brother's decease, and not before, to my sister's children, Ish and Cassell, in equal dividends or shares, and not to be used by any of them until they come to the age allowed by law."

The court analyzing and construing this will say:

"Now, here is an express estate for life, by the words of the will, to Christian, and nothing more, and then to his heir or heirs; and if none at the time of Christian's death, to the children of Ish and Cassell. The limitation of the remainder over to the children of Ish and Cassell is not to take place on the indefinite failure of issue of Christian King, but must vest at the instant of Christian's death, or never. Now had the testator intended to devise all his property to Christian King, and his heirs, why limit over a contingent remainder to the children of Ish and Cassell? If he had intended to devise his whole estate in the first instance to Christian, why do so vain a thing as to limit a contingent remainder over to the children of Ish and Cassell? If he had intended to use the words 'heir or heirs' as words of limitation, he knew that the whole estate was vested at once in Christian, and, why, therefore, create the contingent remainder over? But it may be said, he was ignorant of the rules of law. The presumption is that he knew the law, and that he employed the words 'heir or heirs' in such sense as would permit the remainder to vest on the happening of the specified contingency."

It has already been stated that the words "heir" or "heirs" may be treated as *designatio personae*, or as "child" or "children" if the manifest intent of the testator requires it.

To give effect, then, to each devise in this will, the express life estate to Christian and the contingent remainder to the children to Ish and Cassell, the words "heir or heirs" must be read "child or children." To adopt an opposite construction would be doing violence to the whole will.

But counsel for defendant, with much force, draws a distinction between this will and the Peaslee will, claiming that the King will goes a step further than the Peaslee will, and provides for a limitation over, on the happening of a contingency, and that it was on account of that provision, as appears by the opinion of the court, that the will was held not to be within the Shelley rule. Whereas in the Peaslee will there is no such limitation; and no direction given to the course of the estate beyond the general heirs of the first donee.

It is true the court dwells largely on the working out of this contingent remainder; but, applying the principles laid down to the Peaslee will, how else can we make effective the distinct provisions which prohibits Ed. A. Peaslee from making any disposition of the property for a longer period than his own life and reiterate that in different forms, except by treating the word "heirs" as *designatio personae*.

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It is true, as claimed by counsel for defendant, that there are high authorities holding that the rule is inexorable, and the word "heirs" is to be construed in its technical sense, no matter if the intention of the testator is plainly to the contrary. But that seems not to be the rule in Ohio.

King v. Beck is cited approvingly in Turley v. Turley, 11 O. S., 182, where the court say that "the rule in Shelley's case is at best an artificial one, which in its practical application often defeats the real intention of the testator * * * that it finds but little favor in this country, and ought not to be extended" and further speaks of the rule, being in King v. Beck, thus modified, etc.

This case was decided more than fifty years ago, and has never been overruled, distinguished, questioned or in any way modified, and may, I think, be regarded as a settled law of the state on the subject of the rule in Shelley's case as applied to the construction of wills. Again, as counsel for plaintiffs suggests, if it is the rule, and it is, that where a devise is granted, but in a later clause in the will the devisee is given *jus disponendi*, the estate is thereby enlarged to a fee simple, why, by analogy should not the converse be true, viz.: That where a devisee is granted in fee simple, but later in the will the *jus disponendi* is restricted, the fee is thereby restricted to a lesser estate?

Chiefly on the authority of that case the court therefore holds that the Peaslee will does not come within the Shelley rule, that it devised a life estate to Edw. A. Peaslee, with remainder to his heirs.

The next thing for consideration is the foreclosure case above referred to. Here the mortgage conveyed a fee simple estate. But the court, in rendering the decree, doubtless took notice of the will, and decreed that the life estate of Edw. A. Peaslee in the premises described be appraised, advertised and sold according to law. And that was done. But the court, in the entry of distribution, ordered a deed to the purchaser, S. M. Sullivan, in fee simple.

Defendant claims that although this final order of the court may have been erroneous, it is nevertheless good until set aside; that it cannot be collaterally impeached. And in this connection he further relies upon an old statute long since passed away, but then and for a short time hereafter in full force, which provided:

"That no action of ejectment or other action for the recovery of lands or tenements, shall be brought against any person claiming under, or by virtue of any judicial sale, or any sale of forfeited or other lands for taxes, except within seven (7) years after open and notorious possession taken and continued by the defendant, the person or persons under whom he may or shall claim."

47 O. L., 553 & 54. Passed March 22, 1849.

Plaintiffs respond that this final order of the court for distribution and a deed is not properly a decree at all; is not a finding upon the issues, or based upon any finding: and cannot and does not vary, enlarge or modify the true findings and decree of the court in which the property was ordered to be sold; that the life of the deed is the decree proper; that the title flows from the decree, and cannot rise higher than its source; that the court cannot on distribution enlarge or diminish the title sold under a former decree in the case, and any effort to do so would be void.

And so it seems to this court. In this case the entry of confirmation was probably drawn pursuant to the usual form, and the use of the

word "in fee simple" was probably an inadvertance, the attorney for the moment forgetting that the estate sold was not a fee simple (as usual), but a life estate. But whether accidental or intentional, it could have no effect unless based upon a finding and decree of the court. If such an order was or could be effective, it would be a gross injustice to the mortgagor, since his life estate, which would have a lower appraisement, and fewer bidders and would sell for a lower price, could thereby be bought in cheaply, and the debtor wronged out of his fee simple for a song.

In this view of the court, therefore, the quieting statute referred to would not come to the aid of the defendants.

Next, of what avail was the auditor's deed?

Two objections are made to it.

1st. That there are no presumptions in favor of it: that all the steps necessary to make it valid must be shown, and that the certificate of publication of the delinquent tax list is missing.

2d. That S. M. Sullivan having purchased a life estate at judicial sale, March 21, 1851, sale confirmed May 9, 1851, stood in the shoes of the life tenant, had a right to possession, and was bound to pay the tax and redeem his estate or forfeit it, and that he could not enlarge his estate by buying in the tax title in July, 1852. *Douglass v. Dangerfield*, 10 O., 152.

Both of these objections seem to the court to be good, although the proof of publication might possibly squeeze through under the certificate as to advertisement, on the auditor's books.

Again, defendant relies upon proof of open, notorious and adverse possession for more than twenty-one years.

If the view of the court upon the title conveyed by the will be correct, then the statute of limitations will not avail, for the older one of the plaintiffs was not born until 1867, and Edw. A. Peaslee, the father, did not die until 1893. Hence there is no title by prescription.

Another claim is inserted here, and that is, that the proof shows that Edw. A. Peaslee had another child, a son, who is now dead, and there being no proof of his age at death, or that he died without issue, plaintiffs do not show a clear right to the entire estate, and cannot recover.

There being no proof of his marriage, it is the opinion of the court that the presumption is that he died without issue.

But finally, defendant relies upon proceedings to quiet title, begun and concluded by him in 1890.

Plaintiff's objections to the sufficiency these proceedings as an estoppel have heretofore been briefly given.

They are:

1st. That they were instituted against the unknown heirs of Edw. A. Peaslee, deceased; Peaslee being then alive. No one is heir to the living, is a maxim of the common law, and none can be called such except, as we have seen heretofore as *designatio personae*. And the statute providing for such proceedings, sec. 5058, clearly states that:

"When an heir or devisee of a deceased person is a necessary party, and it appears by affidavit that his name and residence are unknown to the plaintiff, proceedings against him may be had without naming him," etc.

2d. That the defendants are not properly described, being designated as the heirs of Wm. A. Peaslee, whereas they should have been

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described as the devisees of Aaron M. Peaslee, for in that capacity lay their claim to the property, if they had any.

To make a matter *res judicata*, four conditions must concur, viz.:

1st: Identity to the subject-matter,

2d: Identity of the cause of action,

3d: Identity of persons and parties, and

4th: Identity in the quality of the persons for or against whom the claim is made.

Hence proceedings against the right party in the wrong quality do not estop him in the right quality. "An heir, claiming as heir to his mother, is not estopped by matter operating as an estoppel upon him as heir of his father." 21 Am & Eng. Enc. Law, 138.

It seems to the court that both of these objections to the estoppel proceedings are well taken. Peaslee was in *esse* at the time; and his children took title, if any, not as his heirs, but as his father's devisees.

As to whether estoppel can be shown under general denial, the court is of the opinion that it must be pleaded, being new matter. And to that end defendant may have leave to amend if he so desires.

Upon the whole, therefore, the issues are found in favor of the plaintiffs, and a decree may be entered accordingly.

Joseph Hidy for plaintiffs.

Young & Young, and McMahon & McMahon for defendants.

(Note) This case was affirmed on all points by the circuit court in June, 1898.

CHAMBER OF COMMERCE—INJUNCTION.

[Hamilton Common Pleas.]

BISHOP v. CHAMBER OF COMMERCE, AND MERCHANTS' EXCHANGE.

1. In the absence of fraud or conspiracy, courts will not supervise or interfere with the action of the board of directors of a chamber of commerce, in the trial of a member charged with unmercantile conduct.
2. One suspended from membership in a chamber of commerce until he submits to a public reprimand as a punishment for unmercantile conduct, is not threatened with irreparable injury without adequate remedy at law nor entitled to an injunction against such chamber.

MURPHY, J.

On December 31, 1896, the plaintiff was a member of the Merchants' Exchange and Chamber of Commerce of Cincinnati. He was then and now is engaged in the flour trade. At that time Lyman Perin & Sons were engaged in the same business, and were also members of the above named mercantile body. On the day mentioned Lyman Perin, Jr., a member of the firm of Lyman Perin & Sons, made a charge of unmercantile conduct against the plaintiff, to the officers of the chamber of commerce. Under the rules of that body the charge was referred to a committee for the purpose of effecting a reconciliation between the parties, if possible. Failing to effect such reconciliation, under another rule the charge was referred to the entire board of directors for trial. The trial was begun on the twelfth day of January, 1897, and the testimony heard. Before the testimony was all heard three of the directors were excused from further attendance that day, to-wit: John S. Shillito,

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John W. Dunn and William L. Hunt, and in the order named. After the testimony had been all heard, some of the members urged postponement of the vote as to the guilt or innocence of the accused, to enable them to give more consideration to the evidence than they had given it; while others favored a vote then and there. There is a difference of opinion shown by the testimony as to the effect this vote was intended to have. The testimony had been taken in shorthand by Frank Cook, and he was asked when he could have it transcribed into longhand, and answered that it would take him about three days. A vote was taken by ballot, resulting in six voting "guilty" and two "not guilty." After this vote was taken the meeting of the board adjourned until Friday, January 15th. At a meeting of the board of directors held January 15th, a vote of the guilt or innocence of Mr. Bishop was taken, resulting in eight votes for "guilty" and three "not guilty," (Mr. Gibbs not voting). At this meeting John W. Dunn was present and voted "guilty." Messrs. Shillito and Hunt also attended and voted "not guilty." And thereupon the board of directors fixed the penalty that Mr. Bishop should be publicly reprimanded by the presiding officer of the chamber of commerce. January 20, 1897, at one o'clock P. M., was fixed as the time when such reprimand should be administered to him. Mr. Bishop failed to attend at the time and place fixed for the reprimand, but, instead, sent a letter in which he declined to present himself for public reprimand by the presiding officer of the chamber of commerce. Up to this time no right or privilege which Mr. Bishop possessed as a member of the Cincinnati Chamber of Commerce was in any manner abridged or suspended. Mr. Bishop having refused, in writing, to attend and receive the public reprimand, James M. Glenn and four other members of the chamber of commerce filed charges of contempt against him, with the board of directors. Of this charge and the time fixed for the hearing Mr. Bishop had due notice; but, instead of attending the trial, he, through Mr. Littleford, his attorney, denied the power and jurisdiction of the board of directors of the chamber of commerce to try him, and declined to be present at the trial of the charges of contempt. And thereupon the board heard the testimony, found him guilty, and sentenced him to indefinite suspension.

So the matter rested until February 19, 1898, neither party taking any action in the premises, when Mr. Bishop sought admittance to the floor of the chamber of commerce, which was refused him on account of the sentence of indefinite suspension.

The trial of Mr. Bishop on the charge of unmercantile conduct was under sec. 8, art. V of the by-laws of the chamber of commerce (the trial of January 12 and 15, 1897).

And the trial for contempt was under sec. 9 of art. V (the trial of January 22, 1897).

On February 23, 1898, the plaintiff filed his petition in which he asks \$10,000 as damages, and also asks that the defendant be enjoined perpetually from interfering with him as a member or abridging his rights and privileges as such.

This court has no jurisdiction to supervise the action of the board of directors in the trial of a member of the chamber of commerce—it is not a court of errors with power and authority to review their action.

Undoubtedly if a frivolous, or what amounted to no charge at all, were filed against a member, or if it were attempted to establish his

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guilt by palpable fraud, this court could and would interfere. But no such case is made out by the evidence submitted to me.

The penalty of the indefinite suspension, of which the plaintiff complains, is not the penalty sought to be inflicted upon him by reason of his having been found guilty of unmercantile conduct, on January 15, 1897, but as the penalty fixed on the charge of contempt tried January 22, 1897, and concerning the regularity of which there is no complaint. But plaintiff contends that the finding of him guilty on January 15, 1897, is null and void, and therefore he cannot be guilty of contempt in not submitting to a penalty based on a void finding of guilt.

I think this contention is not sound; for the reason that that was a defense which should have been made at the time, and to the tribunal before which the charge of contempt was being tried, and by not making it then and there it was waived. True, he denied the power and jurisdiction of the board of directors to try him for contempt; but that denial of jurisdiction is put on very different grounds by Mr. Littleford in his letter to the board of directors. I quote from it:

"I beg leave to suggest that this trial (referring, doubtless, to the trial for unmercantile conduct) having been finished and sentence fixed, and the time for carrying this sentence into execution having passed, this ends the matter, and the board is without further power to punish Mr. Bishop, either on account of the charges or because he did not in person attend to submit to the reprimand. * * * I therefore suggest that any further attempt on the part of the board of the chamber of commerce to inflict a further penalty upon Mr. Bishop is entirely gratuitous and beyond the scope of the powers of either."

There is another reason why this court should not use the extraordinary power of the writ of injunction in this case: An injunction will only issue where there is irreparable injury and no adequate remedy at law. It is to be borne in mind that the plaintiff is still a member of the chamber of commerce, and has every right and benefit arising therefrom, save only that until he submits to the sentence of reprimand he can not go upon the floor of the chamber. The plaintiff need not have recourse to law, even, for an adequate remedy. He has one in his own hands. To be restored to all his rights in the premises he has only to submit to a public reprimand. But he says that to do this would be to suffer an indignity, and that unjustly, too. Be that as it may, equity has more important matters to preserve than the dignity of anyone.

The injunction is refused.

STREET RAILWAYS—INJUNCTION.

[Butler Common Pleas.]

BELLE S. McMACKEN v. C. & H. ELEC. ST. R. R. Co.

ALFRED COMPTON v. C & H. ELEC. ST. R. R. Co.

1. The meaning of the term street railway as used in our statutes is a track for the running of vehicles which is on a grade with the street, that is filled in between the rails so that the public can use it as well as the street railway company, and built in the middle of the highway, so that burdens imposed on abutting owners on one side of the street are no greater than those imposed upon the abutting owners on the other side.

2. Where a turnpike company grants to a street railway company the right to lay its tracks in a public highway over which the turnpike company had an easement the railway company can gain no greater rights than the turnpike company possessed and an abutting owner is entitled to a perpetual injunction restraining the railway company from constructing its tracks in such a way as to impair the egress and ingress to and from his property.

NEILAN, J.

The above cases are before the court upon motions to dissolve temporary injunctions which were allowed some time ago, restraining defendant, the Cincinnati & Hamilton Electric Street Railroad Company, from constructing its railroad along the west side of the Cincinnati and Hamilton turnpike, in front of the premises of plaintiffs.

The two cases were heard and argued together, and inasmuch as they are governed by precisely the same principles, and substantially the same facts, they will be decided together.

The petition in the case of Bell S. McMaken against the defendant street railroad company, which may be taken as the standard, embodying substantially the allegations of the petition in the other case, recites:

The organization of the defendant street railroad company, and that it proposes to construct and maintain a railroad track and operate cars thereon in front of the real estate of the plaintiff, along the west line of the Cincinnati and Hamilton Turnpike Company's right of way.

That the turnpike road in front of plaintiff's said property is about fifty feet wide; (the evidence shows it is sixty feet wide; the defendant street railway company claims it is sixty-six feet wide, that the traveled part of the road is about fifty feet wide.)

That if defendant is permitted to construct its said railroad on said part of said turnpike road that it has excavated and filled, that it will run in such close proximity to said property that the ingress to and egress from plaintiff's said property which has been platted into lots, streets and alleys, will be materially injured and destroyed.

That plaintiff has platted said property into lots, streets and alleys; that it is immediately adjoining the south corporation line of the city of Hamilton; and it is alleged that is a proper matter to be considered by the court. That the frontage of plaintiff's said property along said turnpike is about one thousand feet which has been so platted and laid out into lots, and is very valuable.

That if defendant company is permitted to so construct and operate its railroad, the value of said real estate will be very materially depreciated, not only as regards said lots along the turnpike, but the residue of said lots lying westwardly from the same.

That large fills and excavations will be necessary to be made upon plaintiff's said real estate in order to conform to the grade of said defendant's tracks; and that the noises and other inconveniences occasioned by the close proximity of defendant's tracks to said real estate will occasion great and irreparable injury to said property.

The question as to the right of this kind of a railway to be built upon a public highway in this state has been passed upon heretofore by this court. After a very careful construction of the question, as careful as the court could give, and very exhaustive argument on the part of able counsel, this court held that the rights of a railroad of this class to be built upon a public highway of the state was constitutional; that the grant of the power by the legislature made in 1894 was constitutional.

But there are two questions that arise in this case which did not arise in the case referred to, that of Dietz et al. v. C. & M. V. Traction Co., 6 Ohio Dec., 513, namely, the injury to the real estate by preventing the ingress and egress to and from the property of the plaintiff, and the fact that in this case the right to construct and operate the road was conferred by the Cincinnati & Hamilton Turnpike Co., another corporation.

In the Dietz case the law itself was attacked, upon the ground that it was unconstitutional; that the legislature had no right to grant the use of public highways for such purpose.

There is one question arises in this case that arose in the Dietz case, and that is, whether the legislature has the right to grant a specific portion of a public highway exclusively for the building and operation of a street railway.

The plaintiff in the Dietz case claimed that the construction of that railway was exclusive of the remainder of the traveling public; that when the ties and rails were laid and cars operated thereon, that it was exclusive of the rights of the public, the public could not travel over the track.

The court decided from the evidence offered at that time and from some conditions that were attached to the grant of the county commissioners, that that ground was not well taken.

The court was assured at that time, and the court believed it, in answer to the claim of the plaintiffs, that the plans of the railway company contemplated filling up the space between the rails with gravel, so that the grade of the road would be upon a level with the top of the rail. The court was also assured that it was a part of the plan contemplated and intended to be faithfully carried out, that the portion of the public road between the center of the graveled portion of the road and the railroad should also be filled in so that the whole top of the traveled portion of the road and all the new part on which the street railway was constructed should be on a level, and instead of being a hinderance to public travel, it would be a great advantage, because it would widen the road.

All the parties understood then, and this court understands now, that that is one of the necessary requisites of a street railway.

Acting upon the faith of that testimony, believing it, the court on that point, in answer to the claim of plaintiff's counsel, used the following language:

"Since the temporary injunction was allowed no work has been done on that portion of the road from the south corporation line of the village of Trenton to the point where the public highway crosses the C., H. and D. railroad track. In its present unfinished condition, while its cars could possibly be run over it, the public could not drive over it; but when completed as contemplated, and as shown by the unfinished portions, the entire roadbed can be used as fully as it ever was."

The court went over that road before it rendered this decision, examined it carefully from Hamilton to the village of Trenton; and the court went over the same road last week, to examine it again, and there has not been a shovelful of gravel put on that road from the city of Hamilton to the village of Trenton that was not there the day the court went over it before it rendered this decision except that portion which was positively enjoined; there enough gravel has been put to fill up between the ties; the ties are uncovered from the city of Hamilton to the

village of Trenton; you can count almost every one of them; and there is a five inch T-rail laid on top of them. The public are as absolutely excluded from the right to travel over that road as if there was a stone wall there.

The reason for making these remarks will be apparent when we come to consider the evidence in the case at bar, because it must be perfectly evident to any person that if there are five inches of solid metal on top of the road, and the ties partially exposed, no vehicle can travel over it, and the exclusion of the general public from that portion of the highway is complete.

In that case, in speaking of whether or not this was a street railway, after citing the decisions, or undertaking as far as the court could to decide without the aid of any decision on the subject, because so far as the court knows that was the first decision ever rendered on the law of 1894, the court said:

"Applying these principles to the case at bar, the court is of the opinion that the construction and operation of this street railroad for the transportation of persons and property, do not impose any additional burden on the owner of the fee, and he is not entitled to compensation, except where some special private right is destroyed or impaired."

The question in this case, therefore, is: Is there any property right destroyed or impaired?

The evidence offered in this case on behalf of defendant, is sufficient for the court to consider.

The court may stop here long enough to say, that in the grant from the county commissioners to the Cincinnati & Miami Valley Traction Company they did embody some conditions which tended to protect the public; but in the contract made between the Cincinnati & Hamilton Turnpike Company and the defendant in this case, the public are not mentioned; there is not a single instance any place in the contract where the public rights, or the rights of individual abutting property owners are protected, or even mentioned. The only condition in the contract, a copy of which was submitted to and carefully read by the court, is one looking to the protection of the Cincinnati & Hamilton Turnpike Company.

Another remarkable fact in this case is, that there is no profile of this road, there are no written specifications showing how it is to be built—none whatever; and on the trial of the case it developed that one man has the absolute right to say how it shall be built. There is no provision in the contract with the Cincinnati & Hamilton Turnpike Company showing how it shall be built, at least so far as abutting property owners are concerned; they are left exclusively at the mercy of this one man—James Christy.

Without taking the testimony of any other witness, let us see what James Christy says. He testified that he is engaged in the building of electric railways; that there is no profile for the construction of this road in controversy. Then he was asked how the road is to be constructed, inasmuch as it had already been stated by counsel, and afterwards stated by the president of the street railroad company, who is a brother of James Christy, that James Christy has exclusive control as to how this road shall be built, and he testified that there will be about four inches of gravel under the ties; that the ties will be about six inches, and the rails about five inches, which makes fifteen inches, all the way through.

Wm. Christy, the president of the street railroad company, said the rails would be about four inches, four or five inches.

The court seeing the rails nearly every day that are being delivered upon the road, the rail being a T-rail, judges they are fully five inches high.

The width of the right of way of the street railroad company is twenty and a half feet, and the sub-grade is nine feet; that is, the ground upon which the four inches of gravel is to be placed before the ties are placed there; the ties are eight feet long; the gauge of the road is four feet eight and a half inches,—that is the standard gauge; poles set from the center of the track six and a half feet; the pole line is twenty-four feet from the center of the pike, that is, the outside rail is twenty feet from the center of the pike; the space between the pike and the outside rail will be filled with gravel to the top of the rail.

The poles upon which the wire will be strung average about twelve inches in diameter—what the witness, James Christy, calls the face measurement—the face of the pole next the track, will be twenty-four feet from the center of the track; that is, the poles being twelve inches in diameter, and being ninety feet apart, will form a line in front of these premises of the plaintiffs within less than two feet, according to the present line of the fence, of the fence line of these plaintiffs' properties.

At the request of counsel upon both sides, the court viewed the premises.

Sighting by the poles as already erected by the defendant at the south end of the McMaken tract, the poles when set, if continued in that line, will be almost where the present line of the fence is.

This proposed railway, it is said, will be run upon a grade substantially with the pike. The court is at a loss to know what that "substantially" means. Assuming it is to be constructed as it now has the appearance, it will have no more connection with the turnpike than the C., H. & D. railroad track has—not a particle.

The question is, under such circumstances, will that kind of a road, built in that way, abutting against these plaintiffs' properties, affect the value of them?

Now comes in the experience of the court with regard to that other road, and it will be seen why the court referred to it.

The only assurance that anybody has here as to how the road will be built, is the word of James Christy.

There is about thirty feet in width of the traveled portion, what is called the macadamized portion of the turnpike. James Christy says between that and the outer rail, that is the rail next to the graveled portion, will be filled in with gravel.

That is what they told the court last year—that it would be filled with gravel, and there has never been a shovelful of gravel put on it.

Suppose this road be built in the same way—and the court has no assurance that it will not be. The company has given no assurance, no guaranty of any kind, that it will be built otherwise. The experience of the court is with regard to human nature; that human nature is very selfish, and after they once get the track there, they do not care whether the public can travel over it or not.

There would be five inches of rail for any person living on the McMaken ground to travel over if they wanted to get in or out of the property. Will anybody pretend to say that would not be an injury to the property?

The same may be said with regard to the Compton property. Mr. Compton testified that if the road is constructed as contemplated, that in

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order to get coal to his premises it would have to be dumped in the pike and then wheeled into his premises. If the road is not constructed there, he can drive right up to his house.

It will be impossible for a person even to walk between the line of this proposed railway and the property of Mrs. McMaken if the road is built, much less to drive there.

If Mrs. McMaken desired to put this property of hers on the market, if she offered any inducement to persons to buy her lots as at present laid out there, it would be necessary to have a road between this road and her property; she could not sell it otherwise.

There is at present but one entrance to her property, but a party owning real estate has a right to enter it wherever he pleases; he is not to be confined to one entrance, and particularly where he has laid it out into lots, of thirty or forty feet, or whatever the size may be, he has a right to unobstructed ingress and egress to and from any of his lots.

There is even no provision that this defendant street railroad company should put boards, or flagging, or do anything to make crossings.

The county commissioners last year, when they granted the right of way to the Cincinnati & Miami Valley Traction Company, required that wherever there was an entrance to premises the railroad company should make a good crossing and keep it up.

Here is absolutely no condition so far as the private property owner is concerned; he is left to take care of himself.

It is a little bit peculiar that the turnpike company should take \$15,000—(for that is what it gets), for allowing this defendant street railroad company to build its track in such a way as to injure the property rights of individuals.

If this railroad company, and all these railroad companies, claim the exemptions awarded to street railways, they must accept the conditions.

The statute requires conditions. The statute requires, in substance, that city councils and county commissioners which have allowed the construction of a street railroad shall impose conditions. It is true it does not say what the conditions are, it would be impossible for the legislature to prescribe them.

Conditions for the benefit of whom?—Not for the benefit of the county commissioners, not for the benefit of the city council—but for the benefit of the public; that is who the conditions are imposed for. It is true there is nothing said about the rights of a private turnpike company, but it is fair to say that the same law, in principle, at least, should prevail, and that there should be some conditions to protect the public.

In this contract there is absolutely none whatever. As the court has stated, the public is not referred to.

This turnpike company gets \$15,000 for permitting this street railroad company to lay its tracks along one of the summer roads.

The evidence shows the public used it as a road in the summer time. Every person who has ever traveled this turnpike between Hamilton and Symmes Corner knows that the public travel on both sides of the center of the road in the summer time in good weather, as it is easier for the horses and vehicles.

It may be extremely questionable whether the Cincinnati & Hamilton Turnpike Company has the right to allow that privilege or not, but the court declines to decide that question at this time.

It may be extremely questionable whether the legislature even has

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the right to grant the exclusive right to a street railroad company to occupy any portion of a public highway.

The Supreme Court of Ohio, in *State ex rel. v. Cincinnati Gas-Light & Coke Co.*, 18 O. S., 238, decided that it was not within the power of council to grant the exclusive right to any company or to anybody.

If the effect of the grant is to exclude the public from the use of the highway, it is extremely questionable whether even the legislature can make the grant. It is sufficient to say, up to the present time it has not attempted to do so.

These street railroads built through the country are new; it is only within the last year or two that they have been constructed,—within the last four years that the law in regard to them was passed.

Street railroads in cities are built in the middle of the street. They are allowed to be built there on the hypothesis that the vehicles of street railroads have just as good right to the public streets as any other vehicle, but no better. The only distinctive advantage that the vehicle of a street railroad has over other vehicles is, that owing to the manner which it must be operated, namely, on metal rails, that it is confined to a certain fixed place upon which it runs its cars, and that while the car is passing it has the right of way, because the other vehicles can go to the right or left. That is the only advantage it has. After the car has passed the other vehicles have the right to go in that place, and no exclusive right is or can be granted to the street railroad.

It is different here. As the court has observed, if they claim the exemptions of a street railway, they must be subject to the same conditions.

A street railway means a vehicle that runs at grade with the street; that is, with the top of the rails on a level with the top of the street that it is filled in between the rails so the public can use it as well as the street railway company. That is the meaning of a street railway, and not two metal rails, five inches high, with nothing between them, and nothing between them and the traveled portion of the road, which practically excludes—in fact absolutely excludes, the public from the use of that portion of the public highway.

The true way to build this road upon that highway is to build it in the middle of the road; if it is a street railway, that is where it should be built, as was decided by the Supreme Court, in *Cin. and Spring Grove Ave. Ry. Co. v. Cumminsville*, 14 O. S., 523, to which decision the court will presently refer. It has no right to build on one side of the street so as to impair the rights of the owners of property to get to and from their property. The easement to and from a party's premises is as much property as the property itself.

That has been decided by our Supreme Court in *Junction R. R. Co. v. Ruggles*, 7 O. S., 1, and in *Peter v. Caswell*, 38 O. S., 518.

It is just as much property, and if it is taken away or impaired, the party has a right of action. And he is not required to sue in damages, where it is continuous; he has a right of injunction to stop the work until he has been paid.

Another injustice that could be perpetrated by this contract upon the people on the west side of the road, and that might be perpetrated upon the property owners upon any road where a railroad is sought to be built as this is, is that some arrangement could be made with the property owners on one side of the road for the right of way for the road to be constructed upon the other side, for the law requires that the con-

sent of the owners of so much of the feet front must be obtained to the building of any of these roads before they can be built; how easy it would be to arrange with the property owners on one side of the road to put the railroad on the other side of the road, without the consent of the owner of a foot of property on the side of the road on which the railroad was to be constructed. All the burden could be imposed on the property owners on one side of the highway, while those on the other side of the highway, with all the benefits being equal with those on the one side, would not have any of the disadvantages. It does not look right, it does not look reasonable, it does not look just, to impose upon one side all the burdens, and give to the other side equal advantages.

The case of *Cin. and Spring Grove Ave. Ry. Co. v. Cumminsville*, *supra*, to which the court referred, is a standard case in Ohio. It is a case which will bear studying, because it states every principle involved here.

There were four plaintiffs in that case. The trustees of the village of Cumminsville, and three private individuals, were parties plaintiff, and asked an injunction, which was allowed by the court of common pleas, against the building of a street railway in the village of Cumminsville, along in the early '60's.

The claim of the trustees of the village was they had never consented to the building of that road; the claim of the private lot owners was this road was built within three feet of the curb line, that it prevented them from getting to their property or away from it.

The court of common pleas allowed an injunction for all the parties. One of them had had an injunction before, and the railroad company had lost its right so far as he was concerned, but so far as two of the private parties were concerned the case was taken to the Supreme Court.

A finding of facts, separate from the finding of law, was found by the court, and upon the finding of facts the Supreme Court acted.

The twelfth finding of fact was as follows:

"12. That when the restraining order allowed in this case was served, the track, as far as laid, beyond Kirby street in front of Dormann's premises, and the grading for track, as far as the same was done, which laying and grading extended about one-third of the distance between Kirby street and Knowlton's corner, was laid so that the top of the rail was even with the grade of the street, and as located, and as intended to be so located that the westerly rail of the track at and near Kirby street was about three feet from the line of the sidewalk and gradually approached the line of the sidewalk so as to be a little more than two feet from the same; that the original plan of the company was to lay the track upon the margin of the sidewalk upon an even grade therewith with gutters or waterways on the outside and between the track and the roadway for vehicles, except between Kirby street and Knowlton's corner, between which points the same relative distance from the northwesterly line of the street, without considerably lessening the radius of the curves, could not be carried out, and that except between these points the general plan was to be carried out beyond Knowlton's corner."

That was the grievance complained of by the two private lot owners, that this railroad track was to be laid within three feet of the curb line; that it prevented them from having any other vehicle come there; that they could not hitch a horse there.

Judge Ranney, in the decision of the case, uses the following language:

"But while our decisions have been thus liberal, in allowing to the general assembly the largest discretion in the management and control of easements acquired for public highways, we have been very careful to say, in the case to which reference has been made, as well as upon other occasions, that they could not be diverted to other purposes than those for which they were acquired; nor enlarged so as to accumulate additional burdens upon the land, or destroy or impair the incidental rights of the owner, appurtenant to his lands located upon the street or highway. The distinction lies between those things which fairly belong to the grant, and those which are reserved to the owner, or by law attach as incidents to his property. For this purpose, there is no occasion to distinguish between lands acquired for ordinary highways, leaving the fee in the owner, and lands dedicated for streets in towns, where the fee vests in the municipal corporation, in trust to answer the purposes of the use. In either case, the interest acquired and used by the public at large, is an easement of a definite character, and held for the attainment of known objects; and in either case, distinct from the right of the public to use the street, is the right and interest of the owners of lots adjacent."

The court in this case quotes from the decision in the case of *Crawford v. Delaware*, 7 O. S., 459, in which the court say:

"The latter (lot owners,) have a peculiar interest in the street, which neither the local nor the general public can pretend to claim; a private right of the nature of an incorporeal hereditament, legally attached to their contiguous grounds and the erections thereon; an incidental title to certain facilities and franchises, assured to them by contracts and by law, and without which their property would be comparatively of little value. This easement, appendant to the lots, unlike any right of one lot owner in the lot of another, is as much property as the lot itself."

In discussing further what is necessary to be done, Judge Ranney uses this language:

"If, in the progress of improvement, the interests of the public require theirs to be enlarged, and his diminished, it can only be done upon making him compensation to the extent of his injury."

The thirteenth finding of fact in that case is as follows:

"13. That the railway track laid upon the side of the street, as proposed, will be an obstruction to the convenient access to the houses and other improvements on the northwestern side of the highway, and would be more of an obstruction thereto than it would be if laid in the center of the highway; but that, taking into consideration all interests, namely, the adjoining owners of lots, the railway company and the general traveling public, the location of the track as constructed and proposed to be constructed, is as little-injurious as it would be in any other part of the highway."

The court, after having discussed the matter at great length, say:

"An application of these principles to the case under consideration, leaves no doubt as to how it must be decided. Allowing the turnpike company to have succeeded to all the rights and interests of the public in the country road—"

(And this court thinks that is the case in the case at bar, the county commissioners have no control over this at all.)

"And the railroad company to have obtained a plenary grant from the turnpike company, yet, it is plain, that the former could make no encroachment upon these lot owners, which the latter could not."

(In other words, the railroad company could not do any more than the turnpike company did, or had the right to do.)

"And it does not admit of a doubt, that after the turnpike company had established its grade, and improved its road, and the lot owners had conformed their improvements to its actual condition, that it could legally make no change, which destroyed or impaired access to their buildings, without making full compensation for the injury. We see nothing in the street railroad act which induces the belief that the legislature intended to authorize, either companies or public authorities, to grant to railway companies anything more than an interest in the public easement; nor do we see any reason to doubt that such a location may ordinarily be made, as to bring the necessary structures for the use of these companies within that interest, and without any invasion of private rights. But if it were otherwise, and it were manifest that the legislature intended to allow these companies to occupy and impair the easements attached to improved lots, and that the necessary structures could not otherwise be constructed or used, we should still be of the opinion that it could not be done without compensation. It is found as a fact, that the proposed construction of this railway track, will be an obstruction to the convenient access to the houses and other improvements of the lot owner; 'and more of an obstruction thereto than it would be if laid in the center of the highway.'"

That the court thinks to be true in this case also. There would be no objection to the building of this railroad if it was built in the center of the road, where it ought to be built.

It is true it would cost a great deal more to build it. That is all that can be said in favor of putting it on one side. There it would be no impediment to anybody; that is where it ought to go.

The court continues.

"It is true, it is added, that taking into consideration the interests of the company, and the general traveling public, as well as those of the lot owners, the location 'is as little injurious as it would be in any other part of the highway.'"

(That is a quotation from the thirteenth finding of facts.)

"This is a common case, when private property is taken for public uses. Reduced into plain English, it simply amounts to this, that the company and the public will gain as much as the lot owners lose. The difficulty of giving this any effect, in the present case, arises from the fact, that the justice of the constitution has provided that what the one thus gains, and the other loses, shall be paid for, before the property is taken or invaded."

It follows, therefore, from what has been said, that this turnpike company could not grant any more than it had, and it had no power to put any impediment in that highway that would injure abutting property owners, and the railroad company can do no more than the turnpike company could.

The court has been cited to a large number of authorities, and it has conscientiously and carefully examined every one of them, has read every one of them from beginning to end. There are reasons which may not be apparent to every one why the court should have been careful in its decision in this case.

The court has been cited to *Plank Road Co. v. Cane*, 2 O. S., 419, where it is held that a supervisor of highways has no jurisdiction or power over turnpikes, constructed by incorporated companies, where authorized by the legislature, and the work has been accepted by the proper authorities.

The evidence shows this was once a public highway, a county road, and afterwards, by operation of law, was converted into this turnpike.

It is sufficient to say, it being converted into a turnpike, with authority to take toll, the county commissioners lost all control over it.

The court has heretofore referred to the case of *Junction Ry. v. Ruggles*, 7 O. S., 1.

Peter v. Caswell, *supra*, was referred to by counsel; that confirms the doctrine laid down in *Junction R. R. Co. v. Ruggles*, *supra*, that the easement is as much property as the property itself, and where it is sought to be taken, it can only be taken by paying for it.

The case of *Railway Co. v. Telegraph Assoc'n.*, 48 O. S., 429, is a case between the telephone company in Cincinnati and a street railroad company. That case decides no principle that applies to this case at all except it decides that no party has the exclusive right to any street.

That confirms the doctrine decided in *State ex rel v. Cin. Gas L. & C. Co.*, *supra*, the celebrated gas case.

The case of *Railroad Co. v. Winslow*, 2 Ohio Circ. Dec., 240, decides that the change of motive power from horses to that of electricity, with poles and wires, was legal.

The court in *Simmons v. Toledo*, 3 Ohio Circ. Dec., 64, hold that council has a right to grant a franchise for an electric street railway, and that a citizen and taxpayer, not the owner of land or lots abutting upon any street along the proposed route, has no right to maintain an action for injunction under the provisions of sec. 1777. That is all that case decided.

The case of *Sells v. Columbus St. Ry. Co.*, 11 Dec. Re., 643, referred to by counsel, holds:

"1. A street railway, whether operated by electricity or animal power, if duly authorized by the legal authorities, is not *per se* an additional servitude on the soil of a public street; and the proposed erection and use of poles and wires, which are accessories of the trolley system, does not entitle an abutting lot owner to an injunction.

"2. The construction of a double track street railway in the middle of a street, so located that the space between the exterior rails and the sidewalk is not sufficient to permit wagons with teams attached to stand transversely between the curb lines and passing cars, is not *per se* a perversion of the street to private uses, or an unlawful infringement of street easements appurtenant to abutting property."

It was contended in that case that the owner of abutting property had the right to have sufficient ground between the street railway and the curb line for a vehicle with horses to stand at right angles to both.

The court held that was not *per se* such perversion of a street for private uses that a party could enjoin them. That is all that was decided in that case.

There was another point raised there which does not apply to this case,—the third sub-division of the syllabus, which is as follows:

"3. An abutter has no such proprietary interest in the maintenance of a public market in a street in front of his property as will entitle him to enjoin the construction and operation of a duly authorized street rail-

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way through the market space, on the ground that by interfering with the market, it will diminish the volume of business transacted on the street, and thereby depreciate the value of his property."

In *Clement v. Cincinnati et al.*, 9 Dec. Re., 688, it is held: "That the change of power from horses to grip or cable, was authorized, and that the modification of the original grant whereby a more rapid transportation was obtained, involving greater expense, was not void, and it authorized a higher rate of fare; and that the change so made without advertising as provided by sec. 5502, Rev. Stat., was not in violation of that provision.

The court in the case of *Pelton v. Cleveland Ry. Co.*, 10 Dec. Re., 545, held:

"The consent of abutting lot owners upon a street occupied by a street railroad is not required, and is not a condition precedent to the right of the council to grant a renewal of the franchise of such street railroad company, under secs. 2501 and 2502 Rev. Stat.

The change in the motive power from horses to that of electricity, does not constitute a new and additional burden upon the street, entitling abutting lot-owners to compensation before such change is made; or to an injunction to prevent such change."

The court has been cited to other decisions, but it thinks *Cincinnati and Spring Grove Ave. Ry. Co. v. Cumminsville*, *supra*, is decisive of this case; the court's decision was upon the particular ground which is involved in this case. The court say:

"Upon the whole case, our opinion is, that the court below erred in holding the road district entitled to maintain an action, and in making the further extension of the railway dependent upon the consent of the trustees thereof."

The trustees, it appears, were willing to consent to the construction if the street railway company would build its track in the center of the street, but the street railway company would not do that, and the trustees would not otherwise consent.

The Supreme Court held, under the peculiar phraseology of the law under which the board of trustees was created, that their consent was unnecessary; and it reversed the court of common pleas upon that point.

The court further say:

"And proceeding to render such judgment, upon the facts as found, as, in our opinion, the law requires, we shall order the petition as to the road district to stand dismissed with costs; and in behalf of the remaining plaintiffs, Eppel and Russell, we shall order the railway company to stand enjoined from the further extension of their track, upon the line proposed, until they have legally acquired the right to do so, by obtaining the consent of these lot owners or otherwise acquiring their interests in the highway."

The judgment of the court in the cases at bar is, that the injunction in each case be made perpetual.

(Note—This case came afterwards before the circuit court, where the following entry was made):

"Said track shall be so constructed by filling the space between the rails and each side thereof, so far as necessary with gravel, so that said track shall not substantially interfere with the use of said turnpike road for travel thereon, but shall permit travel by foot passengers, horses and vehicles and like purposes in front of plaintiff's property, and without

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substantial impairment of such travel. Said railroad shall also be so constructed as not to injuriously interfere with the present system of drainage in front of plaintiff's property."

The court continued the cause until the railroad shall be constructed, and reserved the full right and authority to itself to modify the order or judgment.

DOW LAW TAX.

[Hamilton Common Pleas.]

BLOCK & SONS V. LEWIS, AUDITOR.

1. "Straight whiskies" are those produced directly from grain, by process of distillation, without the use of any liquid, save water, and are marketable when matured by age.
2. Straight whiskies are not "raw materials" under the Dow law, so as to exempt from taxation, although used in making "compound" whiskies and "blends."

WRIGHT, J.

Block & Sons operate distilleries in Kentucky and Pennsylvania, also a re-distillery in Cincinnati, Ohio.

"Straight whiskies" are those produced directly from grain by processes of distillation without the use of any liquid save water, and are marketable when matured by age.

"Compounds" are liquors produced by the union of several ingredients with spirits as the base.

"Blends" are liquors produced by the union of several liquors of a high quality.

Straight whiskies are used in both processes of compounding and blending: these processes are carried on in the Cincinnati re-distillery. Some of the straight whiskies used there are produced at the Kentucky and Pennsylvania distilleries, others are purchased; none of that purchased is re-sold in its original condition.

The straight whiskies purchased are already matured by age, and in condition to be sold in either wholesale or retail liquor traffic, are "Whiskies," according to the acceptance of that term in general parlance. Sec. 2742, Rev. Stat., provides thus: "Every person who shall purchase, receive, or hold personal property of any description, for the purpose of adding to the value thereof by any process of manufacturing, refining, rectifying, or by the combination of different materials, with a view of making a gain or profit by so doing, shall be held to be a manufacturer——."

This statute points out those who are to be regarded as "manufacturers," but fails of pointing out any definition for the phrase "raw material." The Dow law exempts (sec. 8899, Rev. Stat.), manufacturers not absolutely, but only when they manufacture from the "raw material." I am bound to say that it seems to me that "straight whiskies," that is to say those produced by distilling and refined by age into perfected, marketable, drinkable whiskey, is not raw material.

The plaintiffs are liable to this tax. Petition dismissed.

DOW LAW TAX.

[Hamilton Common Pleas.]

JAMES WASH & CO. v. LEWIS, AUDITOR.

Section 8899, Rev. Stat., excepting from the operation of the Dow law "sales at the manufactory by the manufacturer," does not include sales made by distillers in the conduct of their business at the main office where the books of account and samples are kept and orders received and dispatched.

WRIGHT, J.

Plaintiffs operate distilleries in Indiana and in Kentucky, as well as a rectifying house in Covington, Ky. They maintain in Cincinnati, Ohio, a main office in which is kept the books and accounts, and samples of the various goods sold by them. At this office are received the orders from commercial travelers, the mail from customers, and at this office is conducted the general management of the business. Goods are shipped from the Indiana and Kentucky plants to Ohio customers by direction from the Cincinnati office, upon the receipt there of orders.

Section 8899, Rev. Stat., excepts from the operation of the Dow tax "sales at the manufactory by the manufacturer;" I am of the opinion that the sales made by plaintiffs in the conduct of their business are not made at the manufactory, and that the firm are subject to the tax.

The petition is dismissed.

CONSTITUTIONAL LAW—FISH AND GAME LAWS.

[Delaware Common Pleas, April Term, August 1, 1898.]

STATE OF OHIO EX REL. V. LEWIS, AUD.

1. That portion of 409, Rev. Stat., which provides for the appointment of a fish and game warden for each county is in contravention of art. 10, secs. 1 and 2 of the constitution in seeking to create a county office and provide for the filling of that office by appointment, and is to that extent void.
2. The provision in sec. 6966-2, Rev. Stat., that the costs of prosecuting violations of the fish and game laws shall be paid from the county treasury, is an exception to sec. 7136, Rev. Stat., which gives a magistrate authority to require the complainant in misdemeanor cases, when a private citizen, to secure costs, and where there has been a prosecution costs must be paid as provided.

WICKHAM, J.

On November 24, 1897, one of the relators in this case, James W. Roberts, as deputy fish and game warden for Delaware county, made and filed his affidavit with the relator, Alvin Franklin, a justice of the peace in and for Genoa township, Delaware county, Ohio, charging one William Walker with having killed a squirrel in Delaware county, on the thirtieth day of August, 1897, willfully and unlawfully. A warrant was issued by the justice for Walker's arrest, and he was arrested by Roberts, and taken before the justice for trial. On being arraigned he pleaded not guilty and demanded a jury trial. A jury was thereupon impaneled by the justice, witnesses were subpoenaed on behalf of the state and defendant, and on November 30th the cause proceeded to trial. On the

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next day, December 1st, while the jury were out, and before they had agreed upon a verdict, the defendant withdrew his plea of not guilty to the charge; the court thereupon sentenced the defendant to pay a fine of \$25.00 and the costs of the prosecution, and ordered that the defendant stand committed to the county jail until fine and costs were paid. The defendant made default in the payment of the fine and costs, and he was committed to the county jail by the justice.

On January 8, 1898, the justice duly certified the costs of the case to the respondent, Lyman P. Lewis, under sec. 6966-2, Rev. Stat., and requested the respondent to examine said certificate, and to issue his warrant to the county treasurer in favor of each of the relators to whom fees were due, and for the amount due to each, all of which the respondent refused to do, hence this suit for a peremptory writ of mandamus compelling the respondent to issue warrants to the several relators, justice, assistant fish and game warden, jurors and witnesses, for the amount of such fees claimed by them.

The relator, James Roberts, who was the arresting officer, and who served the subpoenas for the witnesses, and summoned the jurors in the case, claims such fees as are paid to sheriffs for like services, by virtue of his authority to act as assistant game warden for Delaware county, under his appointment made by T. F. Bailey, the fish and game warden for Delaware county, May 10, 1897, for the term of two years.

It appears that the said T. F. Bailey is at the present time, and has been the fish and game warden for Delaware county since November 1, 1896, he having received his appointment and commission on that date from the fish and game commissioners of the state.

The respondent denies the right of the relator, Roberts, to any of the fees claimed by him, for the reasons—first, that sec. 409 Rev. Stat., which provides for the appointment of fish and game wardens for the different counties of the state, by the fish and game commissioners, is in contravention of art. 10, secs. 1 and 2 of the constitution, in that it seeks to create a county office and to provide for the selection of the officer by appointment, and is therefore void. Second, that the said Bailey being without lawful authority, could confer none on Roberts. And, third, that Roberts being without official authority, can not lawfully claim fees as an officer. The last two propositions would necessarily follow, if the first is correct.

Is sec. 409, Rev. Stat., unconstitutional?

Article 10, sec. 1, reads as follows: "The general assembly shall provide by law for the election of such county and township officers as may be necessary."

"Section 2. County officers shall be elected on the first Tuesday after the first Monday in November, by the electors of each county, in such manner and for such term, not exceeding three years, as may be provided by law."

The inquiry raises two other questions: First, is a fish and game warden an officer? Second, is a county fish and game warden a county officer?

Section 409, Rev. Stat., provides, * * *

"The commissioners shall, at their annual meeting in January, or at any other time, appoint a fish and game warden in each county in the state, who shall hold his office for two years, unless sooner removed, and they shall also appoint a special warden for Lake Erie and for the Mercer county, Lewiston, Sixmile, Licking, Loraine and Sippo reservoirs of the

state; each warden shall, before entering upon the discharge of his duties, give a bond to the state, with sureties to the satisfaction of the commissioners, in the sum of two hundred dollars, conditioned for the faithful performance of the duties of his office, which bond shall be deposited with the commissioners; it shall be the duty of the wardens, under the general direction of the commissioners, to appoint such assistants as they may require to assist them in policing the territory, both land and water, of their respective counties and territories, arresting wherever found in the state all violators of the laws of the state enacted for the protection of fish and game." * * * "Each warden shall, annually, on or before the first day of December of each year, make a detailed report to the commissioners of their respective labors, number of arrests made, number of convictions, with such other suggestions as they may deem proper; the compensation of the county wardens shall be from fees, the same as are paid the sheriffs of their respective counties for similar services, to be paid from the fish and game fund, which shall be made up from fines arising from convictions for violations of the fish and game laws; and the county commissioners shall, upon the recommendation of the fish and game commissioners, allow to their county warden a salary not exceeding three hundred dollars per annum, which salary shall be paid quarterly, upon the warrant of the county auditor on the certificate of the fish and game commissioner out of the fish and game fund."

In *Meachem on Public Officers*, sec. 9, the author says, "Any man is a public officer who hath any duty concerning the public, and he is not the less a public officer where his authority is confined to narrow limits; for it is the duty of his office and the nature of that duty which make him an officer, and not the extent of his authority."

In *State ex rel. v. Brennan*, 49 O. S., 33, the court say at page 37, "An office, speaking in general terms, is the right and duty to exercise an employment." It is defined by the *Century dictionary* as "a post the possession of which imposes certain duties upon the possessor and confers authority for their performance;" by *Cochran*, in his *Law Lexicon*, "as a position or appointment entailing certain rights and duties;" and by *Bouvier* as "a right to exercise a public function or employment, and to take the fees and emoluments belonging to it." In *King v. Burnell*, *Carthew*, 478, it is said: "The word *officium* principally implies a duty, and in the next place the charge of such duty, and it is a rule that where one man hath to do with another man's affairs against his will, and without his leave, that is an office, and he who is in it is an officer." In *U. S. v. Hartwell*, 6 Wall., 385, it is said: "An office is a public station or employment, conferred by the appointment of government. The term embraces the idea of tenure, duration, emolument, and duties. A government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties. A clerk appointed by a head of a department, under authority of law, holds an office." And in *Bradford v. Justices*, 33 Ga., 332: "Where an individual has been appointed or elected, in a manner prescribed by law, has designation or title given him by law, and exercises functions concerning the public, assigned to him by law, he must be regarded as a public officer. Whether he has been commissioned in form can make no difference; the commission is but evidence of title to the office."

And in the next paragraph but one, "It is not important to define with exactness all the characteristics of a public office, but it is safely

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within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office. And where such duties are wholly performed within the limits of a county, and for the people of that county, the salary to be paid by the disbursing officer of the county, from the funds of the county, the office is a county office, and, as one who is lawfully invested with an office is an officer, the person lawfully filling such place is necessarily a county officer."

By sec. 409, a county fish and game warden is appointed for a definite period of time—two years. He is required to give a bond to the state, with sureties to the satisfaction of the commissioners in the sum of two hundred dollars, for the faithful performance of his duties. He is required to police the territory of his county, and arrest all violators of the law for the protection of fish and game. He is required to make an annual report of the number of arrests made and number of convictions, and for such services an annual salary of three hundred dollars is allowed him to be paid out of the county treasury on the recommendation of the fish and game commissioner. And in addition to his salary he is entitled to such fees as are paid to the sheriffs of his county. He is denominated by the statutes a "county warden;" and it is also significant that the statute recognizes him as an officer, for he is required to give a bond "for the faithful performance of the duties of his office."

His powers and duties are further defined by secs. 6966-2 and 6968, which should be read in connection with sec. 409. By those sections, in all prosecutions for violation of the fish and game laws, he is clothed with authority greater than that of a constable or sheriff. He is required to file an affidavit when he believes there has been a violation of the fish and game laws, charging the supposed violator with the offense. He serves the warrant himself, and arrests and brings the accused before the court. He serves subpoenas on witnesses and summons the jurors, and if the venire be exhausted without obtaining the required number to fill the panel, he may summon any of the bystanders to act as jurors. He takes charge of the jury when they retire for deliberation. In case of a conviction and sentence to jail, he commits the prisoner to the jail of the county the same as the sheriff of the county. By secs. 6966-2 and 6968 he is a "fish and game warden."

From this enumeration of the powers and duties of a county fish and game warden, it is clear under the authorities quoted that he is a public officer, and, in his jurisdiction, he is clothed with the right and corresponding duty to execute a public trust in the supposed interest of the people.

The statute (sec. 409) provides for the appointment of a fish and game warden for each county of the state, and requires them to police their respective counties. It gives each warden such fees as are received by the sheriff of his county. From these provisions it is obvious that the legislative intent was not to require county fish and game wardens to go outside the limits of their respective counties to prosecute violations of the fish and game laws. And it seems this is the construction placed upon it by the fish and game commissioners, for the commission of T. F. Bailey shows that he was appointed "fish and game warden for Delaware county."

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It is not without some hesitancy that we hold the act in question unconstitutional. It is a matter of great delicacy and responsibility for courts to declare acts of the legislature unconstitutional. But it is the prerogative of the judiciary to pass upon the constitutionality of the acts of the legislature whenever such questions are raised in cases pending before them; and if, in their judgment, such acts contravene the limitations imposed by the fundamental law, it is their duty to so hold, and to declare them null and void, however strong may be their sentiments of respect for that branch of the state government which creates the acts, and without regard to the results that may follow.

We hold, therefore, that sec. 409, Rev. Stat., seeks to create a public office, and to provide for filling the office by appointment; that such office is a county office, properly designated "County Fish and Game Warden," and that therein the section is in contravention of art. 10, secs. 1 and 2 of the constitution, and is for that reason, so far, void.

It follows that the relator Roberts is not entitled to any fees claimed by him.

It is further contended by counsel for respondent that the auditor is required, under secs. 6966-, to issue his warrant for costs, only in cases prosecuted by officers authorized or required by statute to prosecute the same. That in all cases under the fish and game laws, prosecuted by persons other than such officers, secs. 1307 and 1309 are applicable, the same as in any other case of misdemeanor; that in the case at bar, Roberts not being any such officer, sec. 6966-2 is not applicable, but the case comes under 1307 and 1309; and the question thus raised calls for a construction of that part of sec. 6966-2, which provides for the payment of costs.

The section reads: "But costs shall not be required to be advanced or paid by a person or an officer authorized or required by statute to prosecute such cases; and if the defendant be acquitted, or if he be convicted, and committed to jail in default of payment of fine and costs, the justice, mayor or police judge before whom the case was brought shall certify such costs to the county auditor, who shall examine, and, if necessary, correct the account, and issue his warrant to the county treasurer in favor of the respective persons to whom costs are due for the amount due to each."

Counsel for respondent argues that, by fair implication, that part of the section I have just read, as I have already stated, provides that the costs shall be paid out of the county treasury, on the warrant of the auditor, only when the prosecution is by a person or an officer authorized or required by statute to prosecute such cases, and any other construction renders the first clause of the provision useless.

That if, in all cases, whether the complainant be an officer or a private individual, the costs are to be paid out of the county treasury, on the warrant of the auditor, there could be no reason or sense in saying that the person or officer commencing the prosecution shall not be required to advance or pay the costs; and the argument is not without apparent force.

But let us examine the language of the provision. It is not that the person or officer shall not be required to secure the costs, but "costs shall not be required to be advanced or paid" by him. The language of the statute must receive the construction, which gives to it its usual and ordinary meaning. "Advanced or paid" can not be read, "secured." There can be no question as to the meaning of the words, "costs shall

not be required to be advanced." But the provision seems to be useless.

It must have been the intention of the legislature to establish a different rule from that already existing at the time of the passage of the act. We know of no law that ever required the prosecutor in a misdemeanor to advance the costs. In all misdemeanor cases, under sec. 7136, the magistrate could require the complainant, except officers in the discharge of their duty, to secure the costs, but not to advance them.

Let us inquire into the purpose of the provision. If counsel for respondent is right, the only purpose is to exempt from liability for costs, the persons and officers required by statute to prosecute violations of the fish and game laws. That any other rule would be unreasonable and unjust is plain. It would be a great hardship to impose the duty on a person to prosecute violations of the law, and at the same time subject him to the payment of costs in case the state should fail. But we do not think that the purpose of the statute is limited in its scope to the exception from liability for costs of persons or officers required to prosecute violators of the fish and game laws and thereby stimulating the officers to greater vigilance in the discharge of their duties.

The legislative intent was to make an exception to the rule as laid down in sec. 7136, and the purpose was for the better protection of fish and game. The object is to exempt all complainants, whether officers or private citizens, from liability for costs in prosecutions under the fish and game laws. Few private citizens, unless they feel especially aggrieved, will complain against another for the violation of the fish and game laws, if by doing so they subject themselves to the payment of costs on failure of the prosecution; but if the liability for the payment of costs is removed, the desire to protect the fish and game is, generally, a sufficient inducement to a person having knowledge of a violation of the law to complain against the offender.

Why should the county pay the costs in cases brought by an officer, and, in prosecutions by a private citizen, on failure of the prosecution, the complainant be responsible for them? We see no good reason for the distinction, but every reason why there should be no distinction under these statutes. In other misdemeanors the case is different. If a person has been assaulted and beaten, or had property stolen or destroyed, or been injured in any manner in his person or property, his suffering the private wrong is a sufficient incentive to cause him to complain against the wrong done, although he subjects himself to a judgment for the costs on a failure of the prosecution; but men are not apt to involve themselves in litigation and incur liability for costs over the catching or killing of fish or game, the property of nobody.

Stringent laws have been passed and great expense incurred by the state for the protection of its fish and game; and it is with the view of procuring the strict enforcement of the law, that the legislature, as far as it could do so, removed all impediments to the prosecution of violators of the laws.

This is the evident intent of the section under consideration, although, as often occurs in the statutes, the language used, in its expression and arrangement, is not a model of excellence.

We hold, that the witnesses and jurors are entitled to a writ as prayed, and for the amount as shown by the justice's transcript; that the justice is entitled to what he claims less \$3.20 which we find to be unauthorized and illegal.

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Several other questions were raised and argued by counsel, but our conclusion already reached made it unnecessary to consider them.

Writ allowed as indicated; respondent to pay costs.

James R. Lytle, for relators.

George W. Carpenter, for respondent.

JUDGMENTS—LIENS—LUNATICS.

[Clark Probate Court.]

CHAS. H. NEFF, ADMR., v. LUCY COX ET AL.

1. Judgment rendered against an adjudged lunatic, idiot or imbecile, by a court having jurisdiction of parties and subject-matter, is binding and conclusive upon him, and can not be impeached in any collateral action, and stands as a valid adjudication until annulled or reversed in some direct proceeding for that purpose.
2. Judgment against an adjudged lunatic and his guardian does not create a lien upon the real estate of the lunatic, as a lien only attaches to such property as defendant or debtor himself might sell, and not to the property held in trust for him to which he has the equitable, but not the legal title.
3. A judgment lien is purely the creature of legislative enactment. It has no other existence. To the common law it was unknown. Such a lien does not *per se* constitute a property right in the land itself, but only gives a right to levy on the same and have it applied to the satisfaction of the judgment. The only right that a judgment creditor has, is to make his lien effectual by sale under execution, to the exclusion of adverse interests acquired subsequent to his judgment.

ROCKEL, J.

In 1888 Nathan McDonald was declared an imbecile, and Chas. H. Neff was appointed his guardian. Afterwards, to-wit: at the May term of the common pleas court of this county, in 1891, the defendant, S. V. Varner, recovered a judgment against "Nathan McDonald, C. H. Neff guardian of Nathan McDonald, and John McDonald."

No execution was then issued, nor was it then sought otherwise to enforce the judgment. In January, 1892, Nathan McDonald died seized of the real estate in the petition described, and within a short time thereafter C. H. Neff filed his final account as guardian in this court, and was discharged.

Some time after this, by consent of all parties in interest, the said C. H. Neff was appointed administrator of said Nathan McDonald, deceased. He then filed his petition in this court to sell the real estate of the decedent to pay debts, etc.

The defendant, S. V. Varner, by way of answer and cross-petition, set up his judgment and claimed it to be a lien on the premises in the petition described.

The administrator having sold the premises, now comes into court and asks for an order to distribute the proceeds, and raises the question as to whether the defendant has a lien on the premises or the fund arising therefrom, by virtue of the judgment set up in his answer and cross-petition.

It is argued that at the time this judgment was rendered Nathan McDonald could not himself have sold the property, and therefore it could not be sold for him by way of execution; that being under legal

guardianship and having no control over it, no judgment lien could be impressed upon it.

That the defendant should have proceeded against the guardian, and if necessary to secure his debt, compelled him to sell the real estate, either by an order of the common pleas court in the exercise of its chancery powers, or by an order of the probate court in which the guardian received his appointment, as provided by law. A judgment lien is purely the creature of legislative enactment. It has no other existence. To the common law it was unknown. Such a lien does not *per se* constitute a property right in the land itself, but only gives a right to levy on the same and have it applied to the satisfaction of the judgment. The only right that a judgment creditor has, is to make his lien effectual by sale under execution, to the exclusion of adverse interests acquired subsequent to his judgment.

Being purely a matter of statute, it will be proper to consider our statutory enactments.

Section 5374, Rev. Stat., provides "lands and tenants, including vested interests therein, and permanent leasehold estates renewable forever, and goods and chattels not exempt by law, shall be subject to the payment of debts, and shall be liable to be taken on execution and sold as hereinafter provided."

This section makes all property subject to execution, except such as is exempt by law, and nowhere within my knowledge is the property of an imbecile as such specifically exempt by law from the payment of his debts.

The next sec. 5375, further provides "such lands and tenements within the county where the judgment is rendered shall be bound for satisfaction thereof from the first day of the term at which judgment is rendered. * * *

These sections make no distinction as to the disability of persons against whom the judgment is rendered.

They include all persons and all property, except such as is exempt by law.

Of course no valid execution can issue or lien exist unless the judgment upon which it rests is a valid one. We are therefore brought to the question whether the judgment in the case at bar is a valid one?

Whether a judgment can be rendered against an imbecile or a lunatic under guardianship? Whether the judgment can be attacked in this action, or is this court bound by the action of the court of common pleas?

The Supreme Court, in *Johnson v. Pomeroy*, 31 O. S., 248, has settled this question, at least as to the validity of such a judgment when rendered at a time when the person is not under legal guardianship, when they say "an insane person may be sued and jurisdiction over his person acquired by the like process as if he were sane. But when it is made to appear to the court that a party to the suit is insane, it is made the duty of the court by the statute (S. & C., 385, sec. 7), to appoint a trustee to prosecute or defend the suit for and on behalf of such insane person. And indeed, before the statute, it was the duty of the court to appoint a guardian *ad litem* for an insane party. *Sturges v. Longworth*, 1 O. S., 554. And no doubt it is the duty of a plaintiff, who sues an insane person, if he has knowledge of the insanity, to inform the court thereof. But the failure to perform any of these duties does not affect the jurisdiction of the court, but only the regularity of the proceedings.

Therefore it is held, that the judgment of a court having jurisdiction of the subject-matter of the suit and of the person of such party, notwithstanding such irregularity is not absolutely void."

"On this principle" says Black on Judgments, sec. 205, "it is held by all courts that a judgment against a person who was *non compos mentis* at the time of its rendition, though joining his legal guardian, is binding and conclusive upon him, is not to be impeached in any collateral action, and stands as a valid adjudication until annulled or reversed in some direct proceeding for that purpose."

I am therefore rather of the opinion that so far as this proceeding is concerned the judgment must be treated as valid and subsisting, yet there might be circumstances under which it might be impeached, even in a collateral action. *Spoors v. Coen*, 44 O. S., 497.

The mere fact however that the judgment is a valid one will not *ex necessitate* make it a lien on the real estate in question.

"In order," says Black on Judgments, "that a judgment should create a lien upon the lands of the debtor, it is first necessary that it should be capable of collection by execution against such property." Could the judgment creditor in the case at bar have collected his judgment by execution against this property? I think not, and this is so for several reasons.

First, it is laid down as a general rule that only such property as the owner or debtor might sell, can be taken on execution against him, (7 Am. & Eng. Ency. of Law, 127, 130; Herman on Executions, 144, 175).

By the laws of the state at the time this judgment was rendered the debtor had no control whatever over any of his property.

The control and management of all his estate was vested in his legally appointed guardian.

Second, all his property was in a certain sense then in *custodia legis*.

When a person becomes so unfortunate as to be unable to care for and manage his own affairs, by the beneficent policy of our law, he becomes the ward of the court, which will transact all his business and care for his property by an agent of its own appointment.

And when the court assumes such jurisdiction over the property of another, such property is in the custody of the law and beyond the reach of any execution.

If the creditor has rights to enforce against such property, he must come into the forum of the court that controls it.

The following strong and apt language portrays vividly the injustice of allowing an execution in cases like the present: "By recognizing the right of such creditor to issue execution on a judgment after inquisition found, and levying such execution not only on the real estate of a lunatic, on which it may be a specific lien before such finding, but on the general personal estate, we produce results so disastrous that no equitable tribunal should permit them to happen unless the necessary consequences are the result of positive law.

"To declare the whole estate real and personal of a lunatic liable to execution of the first creditor who can obtain judgment against him, is to invoke a race for priority among creditors of one whose sufferings, under the most afflicting of the visitations of God's providence, entitle him to the most kindly consideration of his fellow-men.

"It leaves the more humane creditor no alternative between entering the struggle or losing his debt, when the estate of the lunatic is not

fully adequate to meet the execution of each successive creditor who brings suit.

"It would multiply litigation, by turning every demand against a lunatic's estate into an action at law; where the doubt and fears of creditors would induce them to make an effort for priority, the costs and expenses of which must of course be borne by the estate of the lunatic, and so far depreciate the fund for his support and that of his afflicted family, if any he has. It would render the guardian care of this court over the estates of lunatics almost valueless, and would neutralize the grand elements of equality." *Eckstein's Case*, 1 Pars. (Penn.), 59.

This "grand element of equality" is fully recognized and preserved by sec. 6314, Rev. Stat., which provides "if the estate of the idiot, imbecile, or lunatic, is insolvent or will probably be insolvent, the same shall be settled by the guardian in like manner, and like proceedings may be had as are required by law for the settlement of the insolvent estate of a deceased person."

Indeed this section would seem to preclude the idea that there could be any preferences created among creditors of the idiot, imbecile or lunatic, at least after the appointment of his guardian.

And such is the inference to be gathered from the language of the Supreme Court in *Johnson v. Pomeroy*, 31 O. S., 249, when they say: "The estate of an insane person passes to his guardian, by relation as of the date of the adjudication of insanity, as, in case of a deceased person, it passes to the executor or administrator as of the date of the death.

"So that any lien or preference obtained by a creditor before the inquest, must be respected by the guardian to the same extent that such preference secured in the lifetime of an insolvent debtor must be respected by his representatives."

A judgment is not a lien on land unless there is legal or equitable seizure of the land of the judgment debtor. (Black on Judgments, sec. 420.) And an estate under administration can not be the subject of a lien for the debts of a deceased owner. (Herman on Execution, 97).

The defendant or judgment debtor must have a legal title in order that a judgment may operate as a lien, *Baird v. Kirtland*, 8 O., 21; *Schuler v. Miller*, 45 O. S., 331.

In *McIlvaine v. Smith*, 42 Mo., 45, it is said: "There must be an interest in the land which a court of law can enforce or protect, in order that it may be the subject of the lien of a judgment and execution; but a mere equity, unaccompanied by possession of the land, is not such an interest. When the *cestui que* trust has no seizure or possession of the land, nor power to dispose of any estate in the land or to enjoy the occupancy, or to collect the rents and profits, nor power to call upon the trustee for conveyance to himself, he has no estate in law or equity which could pass under a sheriff's sale."

"But in this country" says an author before quoted (Black on Judgments, sec. 457) "in the absence of a statute changing the rule of the common law, a judgment is not a lien on the interest or estate of the beneficiary in an active trust, nor is there any remedy at law to enforce the payment of a judgment out of such interest or estate. The creditor may indeed obtain relief upon a bill in equity, but the ground of the jurisdiction is not that of a lien or charge arising by virtue of the judgment, but of an equity to enforce satisfaction of the judgment by means of an equitable execution."

I am therefore of the opinion that both by the common law and the provisions of our statutes in relation to guardians of imbeciles, lunatics, etc., that no judgment lien can attach to the lands of such imbecile, etc., after the appointment of a guardian, and that in the case at bar the judgment creditor, S. V. Varner, has no lien upon the lands in the petition described.

PARTNERSHIP—INSOLVENT ESTATES—TAXATION.

[Summit Probate Court, Nov. 1, 1897.]

IN RE ESTATE OF JOHN ROBB, DECEASED.

1. Where the assets of an insolvent co-partnership will pay a dividend of only three and three-tenths mills, the creditors being numerous, and their claims varying greatly in amount, and there is no living solvent partner, the partnership creditors have a right to share equally with the individual creditors in the distribution of the insolvent estate of one of the partners.
2. A creditor of an insolvent estate having the unqualified right to the whole of a certain fund, is entitled to interest accruing thereon pending litigation concerning it between such creditor and the administrator; and in such a case the creditor cannot be compelled to accept a percentage with the creditors of the deceased.
3. Funds of an insolvent estate in the hands of the administrator, unlike assets in the case of an assignment, are subject to taxation.

ANDERSON, J.

Ellsworth E. Otis is the administrator *de bonis non* of the insolvent estate of John Robb, deceased, and his application herein prays for an order directing the distribution of the funds in his hands.

John Robb was a member of Meahl, Robb and Company, an insolvent co-partnership composed of John Robb, Jacob Meahl and John Cook. Meahl and Cook are both insolvent, and the partnership assets will pay but three and three-tenths mills on the dollar. The administrator has a fund of \$3,825.77 for distribution, and the creditors of the Robb estate claim that they are entitled to the entire fund to the exclusion of the partnership creditors, who, on the other hand, contend that they have a right to share equally with the individual creditors in this fund; that in any event the individual creditors can exclude them from only so much of this fund as equal, the percentage received by them from the partnership assets.

Various rules have been adopted by the American courts as to the distribution of the joint and separate assets of insolvent partnerships and partners. A number of authorities support the rule that the partnership creditors are confined to the joint assets; that they cannot resort to the individual assets until individual creditors are satisfied, even if there are no joint assets. *Murrill et al. v. Neill et al.*, 8 Howard, (U. S.) 414, 418.

In Kentucky the rule is that the joint creditors must first exhaust the partnership assets; the individual creditors are then entitled to an equal dividend from the separate estate, after which both the joint and separate creditors share *pro rata* in the balance of the individual estate. *Bank v. Keyzer*, 2 Duvall, 169; *Bank v. Kenney*, 79 Ky., 133.

Again it is said that joint creditors may first exhaust the joint assets and then share *pro rata* with the individual creditors in the separate

assets. 19 Vt., 292; Cox v. Miller, 54 Texas, 16; Camp v. Grant, 21 Conn., 41.

Whatever may be said of the equity of such a rule, it is to be observed that it more nearly follows the analogies of the law than any other. At law the partnership creditors may have judgment against the individual members of the partnership and obtain satisfaction from the individual property, but though the separate creditor can levy on partnership property, his lien is subject to the payment of partnership debts.

Still another rule prevails. Where there are joint and separate effects for distribution, the joint creditors can in equity only look to the surplus of the separate estate of a partner after the payment of his individual debts, and the individual creditors can in equity only seek distribution from partnership effects out of the surplus of the joint fund after payment of the partnership debts. But where there is no joint estate for distribution and no living solvent partner, the joint creditors share *pro rata* with the separate creditors in the individual estate. This is the rule in Ohio. Rodgers v. Meranda, 7 O. S., 179, 191; Grosvenor v. Austin, 6 O., 104.

If it is an equitable rule which confines the partnership and individual creditors to the joint and several assets respectively, it is a little difficult to see why the joint creditors should share in the individual assets when there are no joint effects, but such is the rule. Brock v. Bateman, 25 O. S., 609.

At the close of the opinion in the case last cited, Welch, J., says: "What should be the rule where the partnership assets are insignificant or where they will yield to the creditors of the firm a less dividend than the creditors of the individual members would realize from the individual assets, and whether the creditors of the firm should in such case be confined to the partnership assets, we are not called upon in the present case to decide."

Here is an intimation that if the partnership assets are insignificant the court may enlarge the rule for the benefit of joint creditors. However, in Clapp v. Banking Co., 50 O. S., 528, 529, 541, the joint assets were about four per cent., but the court did not consider this as insignificant.

In the present case, however, a dividend of only three and three-tenths mills can be paid to joint creditors. A partnership creditor having a claim of \$1,000 would receive a dividend of \$3.80, but a creditor having a \$3.00 claim could receive nothing. There is a great number of joint creditors with claims large and small, and since some of these can receive no dividend whatever, the court is constrained to apply the maxim "*de minimis non curat lex*." Since the proper distribution of so small a fund is impracticable, there is every reason for saying that there are no joint effects.

It is believed that the Kentucky rule is the most equitable, but we will be obliged to dispose of this case in accordance with the decisions of our Supreme Court in the cases before referred to, and therefore, there being no living solvent partner, the joint creditors under the Ohio rule (or rather the exception to the general rule) are entitled to share *pro rata* in the individual assets with the separate creditors.

Second—The second question for solution arises upon the following state of facts: Stephan Ginther, the first administrator of the Robb estate, was ordered by the probate court to pay the Citizens Savings and Loan Association \$409.83, which sum resulted from the sale of real

estate upon which the bank claimed a lien. Mr. Ginther declined to abide by the decision of the lower court and litigated the question through all of the courts of the state, the judgment of the probate court being affirmed by the Supreme Court and all the intermediate courts. Interest amounting to \$122.95 has accrued upon this claim pending the litigation, and the bank claims a preference over the other creditors to that extent, while they insist that the bank must *pro rata* with them. If the administrator has complied with the order of the probate court, this question of interest would not have arisen; he saw fit, however, to litigate the question, and in so doing he represented all of the creditors.

This interest claim is a demand existing against the administrator as such, and it stands upon an entirely different footing from a claim which originally existed against the deceased. The administrator could not escape paying the costs made by this litigation in full, and neither can he avoid payment of this interest. The bank is entitled to this preference and the interest must be paid in full. If the administrator prosecuted this litigation captiously, the creditors have their remedy against him and his sureties.

Third—Is the fund in the hands of the administrator taxable? He has listed it for taxation, but the estate being insolvent and the Supreme Court having decided in *McNeil v. Haggerty*, 51 O. S., 255, that funds in the hands of an assignee for the benefit of creditors of an insolvent debtor cannot be taxed, he asks for instructions upon this point.

An examination of this case shows that the Supreme Court based its ruling upon a construction of the statutes relating to assignments and to other trustees and not upon the fact of the insolvency of the estate. In commenting upon the legislation bearing on this question the court say, on page 264: "All taxes of every description assessed against the assignor upon any personal property held by him before his assignment shall be paid by the assignee or trustee out of the proceeds of the property assigned, in preference to any other claims against the assignor. Nowhere is it in terms provided that the assignee shall list the property for taxation nor is provision made for the payment of any taxes save those existing against the assignor. This omission seems to us significant when contrasted with the duty enjoined by other sections of the statute upon other trustees. By sec. 2734, Rev. Stat., returns must be made of the property of every ward by his guardian, of every estate of a deceased person by his executor or administrator, etc. It is made the duty of every executor or administrator to apply the assets to the payment of debts in the following order: Fourth—Public rates and taxes and sums due the state for duties on sales at auction."

Again, on page 265 the court says: "The omission referred to would seem also to suggest a distinction between the relation of an assignee to creditors of the assignor and to the trust property held by him, and the relation sustained by a guardian, an administrator or a receiver of a corporation. As to administrators it is true that property in their hands is subject to the payment of the debts of the decedent and that creditors are expected to list their claims as credits, and often it happens that the debts consume the entire assets, but usually there is in fact as well as in contemplation, a residue going to widows and legatees or heirs and they are not required to list for taxation any amount until it is actually received."

This argument of the Supreme Court seems to settle the question beyond dispute, and the administrator will be required to pay the taxes on the funds in his hands.

DOWER.

[Licking Common Pleas Court, April Term, 1896.]

HENRY D. SPRAGUE V. RICHARD LAW ET AL.

Only those claiming through the mortgage instrument can defeat the wife's contingent right of dower in the lands of the husband which were mortgaged before her marriage. Therefore as a mere judgment creditor, she has a right of dower in the whole premises.

JONES, J. (orally.)

This suit was brought upon a mortgage signed by Richard Law in 1892, and became due in June or July, 1893, to secure a note given for a thousand dollars, for a year. An answer and cross-petition were filed by deeds, setting up a mortgage executed in perhaps 1885, at least in the '80's anyway, and which became due, I think, in three years after date. The land was sold under these mortgages, and a balance remains after paying the mortgages of about \$148. Richard Law was married in October, 1893, to Nora Law. That was after the note of Sprague became due, and also the note of deeds. They were a thousand dollars each.

This is submitted to the court upon the application of Nora Law to be allowed out of the surplus the value of her contingent right of dower, she and her husband both being still living.

It is claimed in her behalf that this ought to be estimated from the whole proceeds of the sale, \$2,700, or thereabouts, and it is claimed in behalf of VanVoorhis, who is a judgment creditor, whose liens are subsequent to Sprague and the deeds mortgage, that the value of her contingent right of dower should only be estimated in the surplus. That is the question.

It is decided substantially in *Rands v. Kendall*, 15 O., 671, and in *Taylor v. Fowler*, 18 Ohio, 567, by an *obiter dictum*, and in *Bank v. Hinton*, 21 O. S., 687, that the widow is only to be endowed in the surplus. But these cases have been overruled by the following cases: *Kling v. Ballentine*, 40 O. S., 391, which decides that upon the sale of land encumbered by a mortgage by the executors to pay debts, as against the devisee the widow is entitled to be endowed of the whole proceeds, upon the grounds, 1st: That the widow is only barred of her dower by the release of the mortgage as against the mortgagee. 2d: "In Ohio the legal estate is in the mortgagor until condition broken. After that it is still in the mortgagor as to all the world except the mortgagee."

And that is decided in *Rands v. Kendall*, 15 O., 671; and in *Ely v. McGuire*, 2 O., 223, and is the established doctrine in Ohio that the legal title is in the mortgagor until condition broken as against all the world, and after condition broken as against all the world except the mortgagee. Third: The widow is entitled to dower in all the land, subject only to the right of the holder of the mortgage debt to full payment. That is by this same case, 40 O. S. It is overruled also in the case of *Mandel v. McClave*, 46 O. S., 407, and it is decided in that case, first: That the contingent right of dower in the wife during the life of the

husband is property of substantial value, and that the value may be ascertained by the well known test. Second: She may have the value ascertained in the entire proceeds, and the husband's entire interest shall be exhausted before resorting to her interest. Third: As against others than the mortgagee, creditors of the husband, the value in the entire proceeds will be allowed to her. That is, after the mortgage is paid, if the surplus is large enough. That is decided in the third syllabus; and it is overruled by the Ohio decisions cited on page 411 of this report. Those cases are 28 O. S., 503, 30 O. S., 196, 32 O. S., 210 and this 40 O. S. that I have just cited.

It is claimed, however, that this case differs from these cases that decide that the wife is entitled to have her dower computed in the whole proceeds from the fact that these mortgages were made by Law before he was married, and the condition was broken by the notes becoming due and not being paid before the marriage, and that he had at the time of the marriage only an equity of redemption in the property, and that therefore the widow is only entitled to be endowed out of that equity of redemption. The case of *Rands v. Kendall*, 15 O., 671, is cited. That was a case where a man had executed a mortgage upon his real estate to secure a note; after the note became due, he married; after the marriage he conveyed his interest in the estate, without his wife joining, to the mortgagee. The widow, after her husband's death, brought suit to have her dower assigned in the premises, she not having signed the deed. Judge Hitchcock and the majority of the court decided that as the widow is only entitled to dower in an estate of inheritance of which the husband was seized during coverture, or of an equity in an estate which he held at his death, as she could only be endowed of those two estates, they hold that he was not seized during the marriage of any estate of inheritance in that land, because condition had been broken before the marriage, and the legal estate was in the mortgagee, and he had the equity of redemption, but having himself conveyed that equity of redemption, at the time of his death he was not the owner of it, and therefore she was not entitled to it.

Judge Read dissented, and his dissent has been amply vindicated in the Ohio courts, that the legal estate of inheritance was in the husband for all purposes, except to pay the full amount of the mortgage debt, even after condition broken, and that she was endowable of that estate.

This question depends upon what estate the mortgagor has in the premises. If he has a legal estate of inheritance, then the right of dower attaches—attaches to that estate, and not to the equity of redemption, because he has a legal estate of inheritance. In *Mandel v. McClave*, 46 O. S., 407, it is decided that her contingent right of dower is a valuable property, and that the husband's entire interest therein shall be exhausted before her interest in the land shall be touched. And it follows from that position that although her right of dower attached after condition broken—after these mortgages were made, yet it was a dower interest in the whole estate; and that being her property, his creditors must exhaust his property, and that they have no right against her property—her dower shall not be taken except by those creditors who have the right to bar her dower, which are the mortgage creditors.

It follows that her interest ought to be estimated and calculated out of the whole proceeds of the property, and it may be so done. Counsel may make the computation.

APPEAL.

[Summit Common Pleas, October Term, 1897.]

IN RE ASSIGNMENT OF FERDINAND SCHUMACHER.

The probate court granted an order to the assignees in insolvency to sell a large quantity of stocks of the assignor at private sale, the creditors not being a party to said proceeding. After a sale had been made of said stocks, motions were made by two unsecured creditors to set aside said sale, on the ground that said stocks were not sold for the highest price attainable therefor, and said motions were overruled and the sale confirmed. *Held*: That the order confirming said sale and overruling the motions to set aside the sale, was a definitive and final order, and so affected property rights, that an appeal will lie from such order, to the court of common pleas.

NYE, J. (orally.)

This is an action appealed from the probate court to this court, and a motion has been made to dismiss the appeal and that is the only question now submitted to the court.

The question that is appealed from is an order of the probate court confirming the sale of certain shares of stocks, made by the assignees at private sale, under a former order of that court.

It is claimed upon the part of those filing the motion, that this is not an action which is appealable.

The decision to be made in this case must depend largely upon sec. 6407, Rev. Stat., and the decisions of our courts with reference to that section, and with reference to the kind of a case this is; the section named, so far as it pertains to this case, provides that "In addition to cases specially provided for, appeals may be taken to the court of common pleas, from any order, decision or judgment of the probate court in settling the accounts of an executor, administrator, guardian, and trustees, and assignees, trustees and commissioners of insolvents." It will be noticed that the language used in this section of the statute is broad, as it says "any order."

Our Supreme Court in *Miller & Co. v. Assignee*, 31 O. S., 201, have put somewhat of a construction upon this statute, wherein they held that no appeal lies from a decision of the probate court setting aside or refusing to confirm a sale made by an assignee for the benefit of creditors.

That is the converse of this; that was an order refusing to confirm a sale, whilst this is an order confirming the sale.

The Supreme Court, in discussing this, say "The language of the statute authorizing appeals from the probate court is very general and comprehensive, but it must be construed with reference to the nature of the remedy and the subject-matter. Courts in order to effect the intention of the statute, often restrain, qualify, or enlarge the meaning of the words employed. The language is, that 'appeals may be taken from any order, decision, or decree.' Manifestly, this language is not to be understood in its literal sense. There are many orders and decisions to which it can not be applied, without rendering the jurisdiction of the court inefficient and ineffectual for the purposes of justice. It can not apply to decisions and orders granting continuances, or further time to assignees, or to executors and administrators, or to decisions made during the progress of a trial; nor to granting authority, under the assignment law, to sell at private sale, nor to the fixing of the time within which such sale might be made."

So that the Supreme Court have construed this not to mean every order that is issued by the probate court.

Another decision of the Supreme Court is the case of *Brigel v. Starbuck*, 34 O. S., 280, and the syllabus is as follows: "An order, decision, or decree of the probate court, in a proceeding under the statutes in relation to assignments for the benefit of creditors, is not appealable to the court of common pleas, unless it is of a definitive nature, affecting property rights; and the approval by the probate court of the election of an assignee by the creditors is not an order, decision, or decree of that nature."

I think the decision in this case at bar depends somewhat upon the character and nature of the order that is made, and somewhat upon the parties which are necessary to a proceeding of this kind.

In the first place, the assignees represent all of the creditors, and in procuring orders to make sales, there is no adversary proceeding as between the assignees and the creditors; as a general rule, any adversary proceeding is between the assignees and the assignor or assignors, and with that in view, we get no adversary proceeding as between the assignees and the creditors, until a creditor comes in and undertakes to oppose some action of the assignees, and when the creditor does so, we get an adversary proceeding as between the assignees and the creditor, and when that is done, the rights of the creditor may or may not be affected, depending largely upon what the order is.

The Supreme Court have held in *Miller v. Assignee*, *supra*, that an order to set aside a sale is not appealable, because no property rights are affected, and they use this language, "the refusal to confirm, or the setting aside of a sale, unlike its confirmation, leaves the property undisposed of to be again offered for sale, and giving all desiring to purchase, an equal opportunity to do so."

I think there is a vast difference between an order setting aside and one confirming a sale; the order setting aside the sale leaves the parties to go right over the same proceeding again; the order confirming the sale in my judgment, does fix property rights.

Hence I am of the opinion that when you get an adversary proceeding as between the assignees and the creditors on confirming the sale, you do fix property rights, and the order is definitive and final, as stated in the *Brigel v. Starbuck*, *supra*.

Hence I am of the opinion that under these decisions, notwithstanding the Supreme Court in the first case above cited expressly reserve their opinion as to this kind of an order, by saying: "Without, therefore, saying that an appeal may not be taken in the case of a confirmation of a sale, we are unanimously of the opinion that in case of a refusal to confirm there is no appeal, that an order confirming the sale does fix the property rights, and the case is appealable. This is the first proceeding had that was adversary up to that time."

It has been argued in this case that the order which is appealable, if any order, was the order authorizing the assignee to make this sale.

Our Supreme Court says in *Miller v. Assignee*, *supra*, page 204, "It can not apply to decisions and orders granting continuances, or further time to assignees, or to executors and administrators, or to decisions made during the progress of a trial; nor to granting authority, under the assignment law, to sell at private sale, nor to the fixing of the time within which such sale might be made."

The Supreme Court expressly say that granting this order to sell at private sale was not appealable. If that order is not appealable, and this order not appealable, then you have no appeal from that kind of an order, or proceeding.

Another case has been cited to me by counsel for the assignees, being the case *in re* assignment of the Norwood Park Co., 6 Dec., 341, where the learned judge holds that the case which he had before him was not appealable, but whether he undertakes to hold that there is no appeal from any order confirming a sale, I do not undertake to say. In one place he says: "I am of opinion that in the court of insolvency, although not in a special proceeding brought for that purpose, but in the usual course of general administration, where an order for sale has been had, and such order defines and determines the amount and terms of such sale and the rights of parties in the premises, the subsequent order if it be an order of confirmation, pure and simple, is not appealable."

I am of opinion that this appeal should not be dismissed and that the case is properly here.

Motion to dismiss appeal is overruled.

MUNICIPAL CORPORATIONS—BRIDGES.

[Licking Common Pleas Court, April Term, 1897.]

HONORA SULLIVAN V. NEWARK (CITY).

Where a city is not entitled to demand, and has not demanded a part of the bridge fund, it is not bound to keep the bridges within its limits in repair, as that duty falls upon the county commissioners and township trustees, and, therefore, such city is not liable in an action for damages for injuries received by a person by reason of a bridge, within its limits, being out of repair.

JONES, J., (orally.)

The case of Honora Sullivan v. The city of Newark is a suit brought to recover damages against the city for injuries sustained by the plaintiff by reason of the bridge on Second street, across the canal, being out of repair, by which she says she caught her foot, broke her arm, and suffered pain, etc.

There is an answer filed by the city of Newark, and the second defense substantially is that the city of Newark is not entitled to demand, and has not demanded a part of the bridge fund, and that therefore it is the duty of the county commissioners and township trustees to keep the bridge in repair.

To this defense the plaintiff has filed a general demurrer.

Now, the bridge laws indicate some want of harmony and want of consideration on the part of the legislature when they passed the different sections.

Section 860, Rev. Stat., provides: "The county commissioners shall construct and keep in repair all necessary bridges over streams and public canals on all state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in such cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property within the same; and when they do not demand and receive said portion of bridge tax the commissioners shall construct and keep in repair all bridges in such cities and villages."

That is under the heading and title of "County Commissioners, Title 8, Chapter 1."

Under Chapter 12, section 4938, Rev. Stat., provides : "The commissioners of the several counties shall cause to be constructed and kept in repair, in the manner prescribed by law, all necessary bridges in villages and cities not having the right to demand and receive any portion of the bridge fund levied upon property within such corporations, on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plank roads, which are of general and public utility, running into or through any such village or city."

Now, it does not appear in this defense that this bridge is upon any county or public road, or state road, or anything of that kind, and the two sections are out of harmony in that respect. Section 860, Rev. Stat., provides that the commissioners, in such cities and villages, shall construct and keep in repair all bridges. Now, before this section was amended in 1894, so as to add to it what it did not have before,—that is, that in such villages "the commissioners shall construct and keep in repair all bridges in such cities and villages,"—before that was put in these sections had received a construction that the bridge must be on a state or county road, or the kind of road mentioned in these sections ; and sec. 4938, Rev. Stat., only authorizes the commissioners to build and keep in repair such bridges. But since sec. 860, Rev. Stat., has been amended so as to provide unequivocally that the commissioners shall build and repair all bridges in such cities and villages, I suppose although that amendment was not carried into sec. 4938, Rev. Stat., yet the legislative intent is sufficiently manifest, and it changes the construction put upon these sections by the court heretofore. Of course, cities and villages are allowed to provide a bridge fund by other taxation besides what is levied for county purposes, and perhaps the object of that might have been in these villages where they did not demand part of the county bridge fund to provide for the building of such bridges as were not upon the road specified.

Now, it being the duty of the commissioners to build and keep in repair (Newark being a city that has not demanded part of the bridge fund) all bridges in the city of Newark, it does not seem that the city council, or the city of Newark, has been guilty of any want of complying with their duty, and therefore it appears to the court that they cannot be held liable for this bridge being out of repair.

Of course, sec. 2640, Rev. Stat., provides that the city council shall have control of and keep free from obstruction or nuisance the streets of the city ; and upon that section the circuit court decided that the city of Newark, not having placed lights where a bridge was being constructed, and the place for the abutments having been dug out, and left without any lights, that the city of Newark was guilty of a want of complying with its duty by not keeping the lights there, and seeing that a warning was given ; but I think that is distinguished from this case, as the city of Newark has no authority in any way to repair this bridge, and I do not see hardly how they could keep,—of course, they might have fenced in the bridge, and prevented people from passing over it when it was out of repair, but I think the immediate cause of the injury was the neglect of the county commissioners or the township trustees ; I do not think the city of Newark is liable, and the demurrer to this defense may be overruled.

CHATTEL MORTGAGES.

[Hamilton County Probate Court.]

IN RE ASSIGNMENT OF LEO MERLING.

1. A chattel mortgage given by a failing debtor prior to his assignment to secure payment of an attorney's fees in connection with the assignment must be denied a preference.
2. An attorney who is employed to collect a claim may, without express authority so to do, make the affidavit required by section 6357 to a chattel mortgage securing the claim.
3. But where such an affidavit is made by an attorney prior to his employment to collect the claim, a subsequent ratification of his action by the mortgagee does not give validity thereto.

FERRIS, J.

Application has been made by the holders of certain chattel mortgages for the allowance of the same as preferences in the matter of this assignment, and proofs have been had tending to establish the validity of the debt as well as the observance of the formalities made necessary by the statute in the matter of recording the same.

The case at bar presents a state of facts not unusual, that makes it necessary to examine carefully the proofs that have been exhibited as well as the testimony. The proofs show that Leo Merling was engaged in the transaction of business at 174 Race street in the city of Cincinnati, and while so engaged became embarrassed in business; that finding it necessary to make an assignment for the benefit of his creditors, he attempted to execute preferences in favor of his mother, Bernardina Merling, to secure a note of \$900, dated November 9, 1893; that on the same day he executed mortgages to Louis J. Dolle to secure a note of \$300, one to B. H. Prues to secure a note for \$300, dated October 14, 1893, and upon the ninth day of November, 1893, he executed a note for \$95 to one Edward Wintersmith and secured the same by giving a chattel mortgage. Upon the same day he also executed a note and mortgage for \$116.25, to Caldwell, Antrim & Company, and also executed and delivered to Simon Newel a note for \$160, and secured the same by giving a chattel mortgage upon the stock and fixtures located at his place of business.

Considering the mortgages in the order in which they were filed, it appears from the testimony that the mortgage given to Louis J. Dolle, in the sum of \$300, was to secure a note executed to him for that sum in payment of legal services, which were to be performed by him in matters relating to the assignment. Up to the date of the note the relation of attorney and client does not appear to have existed, and therefore no indebtedness could have arisen on this account, and inasmuch as under our statute the debt must be just, due and unpaid, this claim must be disallowed.

The authorities are clear in the conclusion that whatever services are rendered by counsel prior to the assignment, in matters relating to the assignment, are a debt against the assignor and can not be made a charge against a trust fund. The assignment for the benefit of the creditors of the estate was not complete until the deed of assignment was filed and the bond given, and whatever service counsel may render from and after that time is a charge against the estate, which can only

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be paid out of the trust funds when the conditions set out in sec. 6357, Rev. Stat., have been fully complied with in the filing of a bill of items accompanied by an affidavit showing that the services were performed for the estate; that they were necessary to the assignment, and that the amount charged therefor is reasonable, and not more than is usually paid for such services. And the court, upon being satisfied of the correctness of the items and of a full compliance with this section of the statute, is authorized to charge the trust with the payment of it. In this way, counsel can be paid for whatever services are rendered on behalf of the estate, but the chattel mortgages must be denied a preference.

Coming next to consider the claim of Bernardina Merling, who seeks to establish a preference in the sum of \$900; the court finds from the testimony that Bernardina Merling was a creditor at the time of the giving of the note in the sum set out in the same; that she had no conversation whatever with her counsel, who makes the affidavit required by section 4154, namely, that "the mortgagee, his agent or attorney, shall, before the instrument (chattel mortgage) is filed, state thereon, under oath, the amount of the claim, and that it is just and unpaid, if given to secure the payment of a sum of money only."

The chattel mortgage was executed by Leo Merling in favor of his mother, Bernardina Merling, to secure the payment of this indebtedness so found to be due. The son was instructed to secure an attorney to protect the interests of the mother. He retained one Fred. A. Lamping, a member of the bar, in that behalf. No instruction of any kind appears to have been given by Mrs. Merling to her counsel in reference, and no express power certainly was given authorizing the taking of the security by way of chattel mortgage. The testimony of the attorney is to the effect that his employment was by the son; that he was instructed to take whatever steps should be necessary to secure the claim, and to that end was authorized to act as the agent of Bernardina Merling in all matters relating to the collection of this claim.

It is not contended by Bernardina Merling that the attorney was directed or employed to secure the claim. The owner of the present mortgage under discussion did not know in fact of her son's financial embarrassment, nor indeed was she aware of the manner in which her claim had been collected, but her instructions were to the effect that her interests should be protected. At the time this instruction was given, there was no written evidence of the existence of the debt, but the money, the court finds from the testimony, had been loaned in good faith, and the amount claimed was justly due to her and was a *bona fide* indebtedness from her son for money had and received by him as a loan. Upon the faith that counsel had in the statement made by the son, representing the mother, and by the admissions of the son, who was the debtor, the affidavit that is required under sec. 4154, was made by counsel, without any personal knowledge on his part that any money was in fact due or owing, but relying implicitly upon the statement made by the representative of the mother that \$900 was due to her, subscribed his name to the affidavit to comply with the provisions of sec. 4154.

And here issue is joined and it is contended that under the provisions of this section an attorney is not authorized, under his general employment, to act as the agent or representative of his principal unless he is possessed of express authority and has personal knowledge as to the amount of the claim, as to the justness of the same, and as to the fact that the same remains unpaid; but if the mortgage be given to indem-

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nify the mortgagee against a liability as surety for the mortgagor, that such liability shall be shown and that the attorney must have knowledge which enables him to swear that the same is taken in good faith to indemnify against a possible loss. And it is contended that the general power given to counsel is not sufficient to enable an attorney, in the absence of express power, to comply with the provisions of this section. This leads to the examination of the authorities upon this branch of the case.

Our Supreme Court has held in the case of *Ashley v. Wright*, 19 O. S., page 291, that a substantial compliance with the provisions of the statute only was required; that no formal solemnities were necessary, and that even though the certificate be irregular, the mortgage would be held good.

In the case of *Gardner v. Parmelee*, 31 O. S., page 551, Chief Justice White, announcing the decision, says, with reference to this same section, that the statute does not prescribe a particular form in which the statement on the mortgage must be made. If the statement contains the requisite facts, the form in which they are stated is immaterial. And, referring to the mortgage on the affidavit, the court says that the mortgage and the affidavit are part and parcel of the same instrument: "The affidavit shows the nature and extent of the claim arising out of such liability, as well as upon the note held by him. Looking to the manifest object of the statute, it seems to us that its requirements have been in the present case substantially complied with." And syllabus "i" states what I believe to be the law upon the subject, that the affidavit required by the statute to be entered on a chattel mortgage need not be made in any particular form: "If the affidavit contains the requisite facts, the form in which they are stated is immaterial. Where the affidavit refers to matters contained in the mortgage the matters thus referred to are to be regarded as a part of the affidavit."

And in the case that went up from this county, the case of the *Gambinus Stock Co. v. Weber*, 41 O. S., page 69, the court held, with reference to the form of the chattel mortgage, where it appeared that the agent of the corporation had omitted to affix his name thereto, the other formalities having been observed, that "the verification is sufficient *prima facie*, and can only be overcome by evidence that the statement was not in fact sworn to by a proper agent of the corporation."

The court held, in the following language, that "we are of opinion that this faulty statement is sufficient *prima facie*, and that the mortgage is good as against subsequent judgment creditors, unless they are able to show that the statement was not in fact verified by a proper agent of the company." The words of the statute requiring the mortgagee to place a verified statement on a chattel mortgage are as follows: "The mortgagee, his agent or attorney, shall, before the instrument is filed, state thereon under oath the amount of the claim and that it is just and unpaid." The statement must be verified, and the court say, at page 690: "The object sought to be attained is to give notice to the world on the condition of the mortgaged property. So also the object of the statute in requiring the mortgagee to enter a statement of the amount of his claim, verified before a proper officer, upon the chattel mortgage, before filing is to notify the public of the amount of the lien. Although defective, the statement in this case shows the amount of the debt secured by the mortgage, and when read in connection with the certificate of the notary public, shows that it was sworn to by the mortgagee."

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* * * And that it was a substantial compliance with the statute." And refers approvingly to the cases of Ashley v. Wright, and Gardner v. Parmelee, heretofore referred to.

If, therefore, under this decision it was *prima facie* proof that the party making the affidavit was the agent of the Gambrinus Stock Company, even though he did not subscribe to the affidavit, it would be *prima facie* evidence from the form of the affidavit in the case at bar, that Fred. A. Lamping was the attorney of Bernardina Merling. But we are not left by the testimony to struggle with presumptions.

The attorney, under oath, says that he was authorized to take whatever steps should be found necessary to collect the same; that he considered his general employment to authorize him to act as attorney in compliance with the provisions of sec. 4154. The term "attorney" is much broader, the scope of the employment more far-reaching, and the obligations of a higher character than that of a mere agent. While the agent would be limited to such instructions as were given to him by his principal, the attorney would be bound to act according to the discretion which he himself would be justified in exercising. He stands exactly in the position of his principal, and when he ceases to represent the principal, represents nobody. The employment of an attorney carries with it full authority to do any and all legal things necessary to be done in relation to the matter for which employment is had.

Bernardina Merling placed her claim in the hands of a lawyer. This carried with it full authority to do what was necessary in the matter of the collection of the claim. Being unable to collect the same, counsel acted in the right direction in securing it, and this, under the general power that is given to counsel to act as the attorney or representative, he had a right to do. I am therefore of the opinion that this mortgage, both in form and substance, is a substantial compliance with the law relating to the execution of chattel mortgages, and it is the first and best lien upon the fund now in the hands of the court for distribution.

Coming now to consider the claims of B. H. Prues, No. 2308 D, dated November 9, 1893, filed at 11:14 o'clock A. M.; Simon Newell, No. 2309 D, dated November 9, 1893, filed at 11:15 o'clock A. M.; Edward Wintersmith, No. 2310 D, dated November 9, 1893, filed at 11:16 A. M.; and of Caldwell, Antrim & Company, No. 2311 D, dated November 9, 1893, filed at 11:17 o'clock A. M., an examination of the mortgages discloses that they were all sworn to by an attorney whose employment does not, from the testimony, seem to have been made until after the execution of the mortgages; and from the testimony, the court is not able to find any authority at all was given to the attorney to act as the representative of these parties. If the party making the affidavit was neither the mortgagee, his agent nor attorney, no compliance at all is had with the provision of this section herein frequently referred to, and the question arises as to whether or not subsequent ratification can cure a defect of this character.

I am of opinion, based upon the authorities, that ratification never covers an authority not already given in cases of this character. While it is held that a substantial compliance is all that is necessary, no compliance whatever is not substantial compliance, and I do not find from the testimony any facts which show that the counsel in question was ever authorized by the parties whom he claimed to represent to act for

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them in the matter of the making of chattel mortgages. These chattel mortgages will, therefore, be denied any priority over general creditors.

Frederick A. Lamping, for mortgagees.

Jerome D. and William Creed, for the unsecured creditors.

PRIORITY OF MORTGAGE—LIENS.

[Hamilton Probate Court, March 3, 1885.]

*** RACHEL MARTIN, ADM'X OF GANO MARTIN, V. JOHN MARTIN ET AL.**

A mortgage was executed to A and others to secure the payment of several notes, one of which was payable to A; A assigned the mortgage to B by the following endorsement: "For value received, I hereby assign and transfer to B, his representatives and assigns, the within mortgage and notes thereby secured, etc.," and pretended to transfer all the notes described in the mortgage by forging the names of the owners thereof. B took the notes without knowledge of the fraud. Subsequently A, being indebted to C, transferred and assigned by indorsement, the genuine note payable to himself, to C, who took it before due and without knowledge of the fraud perpetrated upon B. Held, that as between B and C the latter was entitled to the payment of the note, and that the benefit of the mortgage passed with the transfer of the note.

On the first day of January, 1879, Gano Martin, now deceased, executed and delivered to W. R. McGill and others, his mortgage deed for the property now ordered to be sold to secure the payment of eight notes, amounting in the aggregate to \$16,113.69. Among the notes so executed and delivered, was a note payable to the order of W. R. McGill, for \$7,602.72.

On the eighth day of February, 1879, McGill, being indebted to Robert Kernahan in a large amount, transferred and assigned the mortgage so made by Martin, to Kernahan by the following assignment endorsed on the mortgage: "For value received, I hereby assign and transfer to Robert Kernahan, his representatives and assigns, the within mortgage and notes thereby secured. February 8, 1879. William R. McGill." And pretended to transfer all of the notes described in the mortgage by forging the names of Gano Martin and the owners thereof, representing to Kernahan that these notes were the notes secured by the mortgage.

Kernahan took the notes without knowledge of the fraud. On the ninth day of May, 1879, McGill being indebted to Manss Bros. & Co., transferred and assigned by endorsement thereon, the genuine note of \$7,602.72 made by Martin to McGill, to them, before due and without notice or knowledge of the fraud perpetrated by McGill on Kernahan.

GOEBEL, J.

It being now conceded by Kernahan that he has no claim against the mortgagees other than Manss Bros. & Co., the question to be determined is as between them, who has the better right to the lien of McGill in the proceeds of sale.

It is claimed on behalf of Kernahan that the assignment of the mortgage to Kernahan before the transfer and endorsement of the note to Manss Bros. & Co., passed the right of possession and property in the McGill note to him.

I believe the law to be well settled in Ohio that a mortgage deed of real estate is regarded in equity as a mere security for the performance

* This judgment was affirmed by the common pleas and circuit courts.

of its condition of defeasance. If that condition be the payment of a debt, the security is regarded as an incident belonging to the debt, and the equitable right to the benefit of the security passes by the legal transfer of the debt to the assignee, unless the agreement to the transfer by the parties be otherwise; and that a note payable to order or bearer, when properly endorsed, and delivered for a valuable consideration, before due, is, in the hands of a *bona fide* holder, free from all equities between the original parties.

Do Manss Bros. & Co. come within this provision? Assuming for the present that this note was not secured by mortgage, there can be no question between Kernahan and Manss Bros. & Co., that the latter are entitled to the payment of their note, having received the same by proper endorsement before due, for a valuable consideration in the ordinary course of business, and without knowledge of any fraud. And it is evident that McGill did not intend to transfer to Kernahan the genuine note.

But it is strongly urged that McGill having, before the transfer of the note to Manss Bros. & Co., transferred and assigned the mortgage with a stipulation transferring the note also, he thereby transferred in equity all the interest he had in the note. In other words, that a transfer of a security carries with it the debt and that too, as in this case, where the debt was not transferred or intended to be transferred except by the mortgage. I cannot agree with counsel on this proposition.

I am satisfied that, if this note was still in the hands of McGill, or passed into the hands of a third party with knowledge of the fraud, equity would decree that such party held the note in trust for Kernahan. In law McGill could transfer the note by endorsing thereon his name, and the title passed to a *bona fide* holder for value, if endorsed before due, free from all equities.

The debt is the principal and the mortgage an incident, the contention being between Kernahan and Manss Bros. & Co., as to who has the security of his respective debt. From the statement of facts it appears that Manss Bros. & Co. have the genuine note. It must follow that by the transfer of the debt, the benefit of the security passes with it, in law. To hold otherwise would be to apply the mortgage to a note which it was not given to secure, and make the mortgage property liable for a new debt.

John Johnston, for Kernahan.

W. E. Jones, for Manss Bros. & Co.

PERSONAL LIABILITY OF ADMINISTRATORS.

[Hamilton Probate Court, December 10, 1885.]

IN RE ESTATE OF WILLIAM WAKEFIELD.

Where an administrator, having knowledge of a valid claim against an estate, and having funds in his hands to pay it, pays all other claims in full, and without regard to their preference, thereby exhausting the funds in his hands, he is personally liable to the creditor for the full amount of his claim.

This cause came on for hearing on the application of C. H. Moore for an order to compel the administrator of Wm. Wakefield to pay his

Hamilton Probate Court.

claim. It appeared from the evidence that Moore became the attorney for Wakefield in his lifetime, and had rendered to him professional services; that after the death of Wakefield, Moore presented to the administrator his account for such services, and the claim having been rejected, he brought suit thereon, and on June 1, 1881, recovered a judgment against the estate for \$1,219.50; and that the administrator has failed, neglected and refused to pay the same or any part thereof.

It also appeared that an inventory and appraisement was filed, showing the amount of the personal property to be of the value of \$2,167.00, which came into his hands as such administrator. The bulk of this property, consisting of jewelry, was disposed of by him from time to time, in such manner and for such price as he felt disposed to receive, without any regard as to time, or place of sale, or the appraisement, and without complying with any of the statutory provisions on that subject.

It also appeared that he has paid all of the debts of the estate (except this claim) in full, and maintains now that there is no money in his hands to pay this claim, by reason of the estate being insolvent. It further appeared that he realized from the sale of such goods \$1,774.46, and that there are in his possession goods of the value of \$380.00, making a total of \$2,154.46, and within \$13.00 of the full amount of the appraisement.

GOEBEL, J.

The course pursued by this administrator in the sale of this personal property was a direct violation of law; and whether an administrator, under such circumstances, would be chargeable with the appraised value or actual value of such property, or only with the amount actually received by him, it is not necessary to consider in this case, since the appraisement and amount realized are about the same. It is sufficient to say that he had money in his hands to pay a dividend on the claims against the estate.

The only question in this case is, whether an administrator, who, having knowledge of a claim, and having funds in his hands, pays all other claims in full and that, too, without regard to their preference, and thereby exhausts the funds in his hands, is liable personally to such creditor for the full amount of his claim so unpaid.

Section 6108, Rev. Stat., provides that an administrator is not liable to the suit of a creditor of the deceased until after the expiration of eighteen months, except where a claim has been disputed or rejected by him. Nor can a creditor compel the payment of his claim until after the expiration of the eighteen months.

And by sec. 6109 an administrator may, after the expiration of one year from the time he gave notice of his appointment, pay the debts due from the estate, and not become personally liable to any other creditor in consequence of any such payment made before notice of the demand of such creditor, although the estate should be insufficient to satisfy such last mentioned creditor.

It would seem from the reading of this last section that an administrator may pay after the year from the time notice was given, without being personally liable to a creditor who had not presented his claim, or of which the administrator had no notice; but such administrator must pay the debts after the eighteen months.

Here was an administrator who had actual knowledge of this claim before and after the year. He had assets in his hands, which he could

In re Estate of William Wakefield.

have applied to the payment of this claim, yet he saw fit to do otherwise. He paid all other claims in full.

It seems to me that if an administrator having notice of a claim of a creditor, shall notwithstanding, pay all others in full, and thereby exhaust the funds in his hands so that such creditor would receive no part, such administrator is individually liable to such creditor for the full amount of his claim, although the payments to such other creditors were made after the eighteen months; and, notwithstanding that such omitted creditor may only have received a proportional part of his claim, if he had been considered in the general distribution.

The administrator could have protected himself without considering this creditor, knowing of his demands. The payments so made by him were in his own wrong.

There are other questions involved which are not necessary to consider. An order will be made directing this administrator to pay this claim in full.

Molony & Molony, for estate.

W. G. Williams, *contra*.

CRIMINAL LAW.

[Hamilton Probate, December 16, 1885.]

EX PARTE JOHN JORDAN.

Where a prisoner was convicted and sentenced for two offenses, the second sentence to take effect after the expiration of the first, and the law under which he was convicted and sentenced for the first offense was declared unconstitutional while he was serving his first sentence. Held, that the prisoner was entitled to a discharge, for the first sentence was a nullity, and as the second was to take effect after the expiration of the first, it was void for uncertainty.

PROCEEDINGS ON *habeas corpus*.

GOEBEL, J.

The prisoner, on the twenty-seventh day of December, 1884, was convicted in the police court of this city on a charge of having burglar's tools in his possession, and was sentenced to the work-house for twelve months and to pay a fine of \$100. On the same day, in the same court, he was tried and convicted on the charge of carrying concealed weapons, and was sentenced to pay a fine of \$200 and costs, and stand committed until the fine and costs were paid. The last sentence was to take effect after the expiration of the previous sentence.

The prisoner now applies for a writ of *habeas corpus*, and asks to be discharged, for the reason that the law under which he was convicted and sentenced (namely, for having burglar's tools in his possession), was declared unconstitutional in May, 1885; *ex parte* Falk, 42 O. S., 638; that the time of sentence under the second charge began and took effect at that date, and that by reason thereof he has now worked out the fine and costs under the second sentence, he being relieved from serving the remainder of the first sentence by the act being declared unconstitutional; and that he is now illegally restrained of his liberty by the superintendent of the work-house.

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The question that presents itself is, When did the sentence on the second charge take effect? I cannot agree with the counsel for the prisoner that the second sentence took effect at the time the act was declared unconstitutional, namely, in May, 1885.

I am of the opinion that the act under which the prisoner was tried, convicted and sentenced for having burglar's tools in his possession having been declared unconstitutional, affected the proceedings from the beginning.

An unconstitutional law is void, and is no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and absolutely void, and can not be a legal cause of imprisonment.

If there was no law, and no conviction could have been had under it, it must follow that the conviction and sentence were illegal and void on the twenty-seventh day of December, 1884. If that be true, it must follow that he was not serving his term on the first sentence at any time, since there was no law, no trial, no sentence, no term to serve. The second sentence began, then, on the twenty-seventh day of December, 1884, if it began at all, and under the rules he has worked out his fine and costs under such sentence.

But were I mistaken in this conclusion, I would further hold that the second sentence, which provides that the same shall take effect after the expiration of a previous sentence, is void for uncertainty. The word "expiration," used in the commitment, means not an expiration of a previous sentence as a matter of fact, but the expiration of a sentence as matter of law. As matter of law, there was no sentence. There never was a commencement of any such sentence, and necessarily there could not be any expiration of it.

Whether or not the prisoner ought to be taken to the police court and re-sentenced on the second charge, is not for me to determine. It is sufficient for me to say that under the commitments the prisoner is entitled to his discharge.

W. L. Granger for Jordan.

PRIORITY OF CHATTEL MORTGAGE.

[Hamilton Probate Court, February 11, 1886.]

IN RE ASSIGNMENT OF B. G. LANDMAN.

A chattel mortgage filed October 13, 1882, at 3:05 P. M., and re-filed October 13, 1883, at 11:15 A. M., held superior to the lien of a deed of assignment filed August, 1884, and continued so until October 13, 1884, at 11:15 A. M.

ON MOTION for a distribution.

GOEBEL, J.

On a former hearing, this court held that as between the mortgage of John Landman, assigned to Mente and Stewart, the former had priority over the latter. The question now raised is, whether Mente has a lien as against the general creditors represented by the assignee. The same questions are now raised by the assignee that were raised by Stewart, they having been considered

In re Assignment of B. G. Landman.

heretofore. I want to add, the statute provides that every mortgage shall be void against creditors of the person making the same, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of said term of one year a true copy of such mortgage, with a statement of the amount, shall again be filed. It has been held in *Seaman v. Eager*, 16 O. St., 209, 214, that a mortgage filed on the twenty-ninth day of July, 1861, at 8:30 o'clock A. M., ceased to operate as against creditors of the mortgagor at 8:30 o'clock A. M., of July 29, 1862, and that the proper time for any of the successive filings of a mortgage depends wholly upon the time of the filing next preceding, and has no relation to the time of the original filing. The last filing of this mortgage was on October 13, 1883, at 11:15 A. M.; the preceding filing was on October 13, 1882, at 3:05 P. M. The assignment was made in August, 1884. The filing of the mortgage on October 13, 1883, at 11:15 A. M., was within the year. It again became a valid and subsisting lien on the thirteenth day of October, 1883, at 11:15 A. M., and continued so until the thirteenth day of October, 1884, at 11:15 A. M. It follows that Mente had on the day of the assignment a valid mortgage and is entitled to the payment thereof.

Campbell & Bettman, for Mente and Landman.

Mannix & Moorman, for Stewart.

Noyes & Fitzgerald, for general creditors.

WILLS.

[Hamilton Probate Court, March 3, 1886.]

IN RE WILL OF EVA S. BLYMEYER.

1. The probate court has jurisdiction to admit to record a copy of the last will of a person who dies while temporarily residing in this county, leaving personalty but no realty therein. Section 5943, Rev. Stat., providing for the probate of a will within a certain time by a devisee who knows of its existence, and has the same in his power to control, under a penalty of forfeiture of his interest therein, has no application to a case in which the issue is whether the will presented for probate is the last will and testament of testator.
2. Declarations of a testator are admissible to rebut the presumption of the revocation or destruction of a lost will.

This is an application to admit to probate the last will and testament of Eva S. Blymeyer, deceased, as provided by Sec. 5944 of the Rev. Stat.

It appears from the testimony that Mrs. Blymeyer was an old lady who, having children living at Mansfield, Ohio, and in Cincinnati, was in the habit of visiting and staying for a short period of time with her children at Mansfield, and at times with her children in Cincinnati. In 1871, the time being fixed as of October 10th or 11th, (she was then living with her children at Mansfield) she executed a will, a copy of which is now presented. This will was executed according to the laws of this state, and was duly attested by two witnesses. After its execution, it was given to Mr. Stevens, one of the subscribing witnesses, for safekeeping. He had it in his possession for several years, when at the request of the testatrix, he delivered and surrendered the same to her. She died in the early part of 1883, at the house of her son, in Cincinnati;

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she had been for several months visiting this son before the time of her death. She left no real estate in this county, and the personal property left were her wearing apparel and about \$100 in cash.

This application is resisted by a creditor of one of the heirs of the decedent, and it is maintained :—

First, that this court has no jurisdiction to admit this will to record, the decedent not being a resident, and not leaving personal property, or property in this county, which would give this court jurisdiction of the subject-matter.

Second, the statute of limitations is pleaded, on the ground that this will was not presented for probate within three years, as provided by sec. 5943 of the Rev. Stat.

Third, that there is no evidence that the paper writing, purporting to be her "last will and testament," was in existence subsequent to her death and not revoked by her.

GORBEL, J.

As to the first objection made, I am clearly of the opinion that this court has jurisdiction, if it finds this to be the "last will and testament" of Eva S. Blymeyer, to admit the same to record; that the personal property left by her, although insignificant in amount, gives this court jurisdiction; and that the existence of personal property in this county, which would be subject to the payment of the debts of the decedent, is sufficient to satisfy the requirements of the statute.

As to the second objection. viz.: that this will ought to have been presented within three years, as provided by section 5943, which provides that "no lands, tenements or hereditaments shall pass to any devisee in a will, who shall know of the existence thereof, and have the same in his power to control, for the term of three years, unless, within that time, he shall cause the same to be offered for, or admitted to, probate; and by such neglect, the estate devised to such devisee shall descend to the heirs of the testator"—the statute is not applicable to this case. This section may be considered as a penalty, by which a devisee in a will may lose his interest by his failure to have such will admitted to record and probated. Whether, after the three years, such party shall lose his interest, which otherwise he may have had under the will, is not a question to be determined by this court on an application to admit such will to probate. The question is not whether such party has an interest, but whether the will presented is the "last will and testament" of the deceased.

But the principal question involved in this case is, whether the paper writing, presented now to the court, is the "last will and testament" of the deceased. I find, as a matter of fact, that Mrs. Blymeyer did execute a will October 10 or 11, 1871; and that the contents of that will were as stated in the copy now presented. By sec. 5944, "The probate court shall have full power and authority to admit to probate any last will and testament which such court may be satisfied was duly executed according to the provisions of the law upon the subject in force at the time of the execution of such last will and testament, and not revoked at the death of the testator, when such original will has been lost, spoliated or destroyed subsequent to the death of such testator, or after the testator has become incapable of making a will by reason of insanity, and it cannot be produced in as full, ample and complete a

In re will of Eva S. Blymeyer.

manner as such court now admits to probate last wills and testaments, the originals of which are actually produced in court for probate."

The question arises: Was the will lost or destroyed subsequent to the death of said testatrix? The evidence establishes the fact that the testatrix had the will in her possession, and the same cannot now be found, which raises the legal presumption that the same had been destroyed by her and is revoked. In the absence of evidence, the court will not presume that the will has been abstracted fraudulently or criminally, but the presumption of the revocation of a will when the same was in the possession of the testatrix does not arise unless there is evidence to satisfy the court that it was not in existence at the time of her death. It can hardly be questioned that Mrs. Blymeyer manifested a strong desire to make a testamentary disposition of her property, and not to die intestate. It is proved that, on the day preceding her illness, in conversation with Mrs. William H. Blymeyer, she said that she had made a will, and how comfortable and pleased she was that she was leaving whatever little she had to leave to her children; because, she said, they helped to make the money; and she further said, "I don't think they will have long to wait, because I am weaker than any of them know." True, it leaves a doubt as to whether she had reference to the will executed on October 10 and 11, 1871; but the will that she had executed was a fair and just will to her children, and there is no proof of any expression by her of dissatisfaction with the will; and it leaves on the mind of the court the conclusion that the testatrix continued in the same mind from the date of her will down to the time of her death. And there is nothing to show any change of intention, which was likely to lead to a revocation of the will. She was on good terms with her children, and the expression made to Mrs. Blymeyer on the day preceding her illness clearly indicates that her mind was not changed on the subject.

The will will be admitted to probate.

Taft, Morris & Taft, for the will.

Paxton & Warrington, for creditors.

WILLS.

[Hamilton Probate Court, April 20, 1886.]

IN RE WILL OF WILLIAM WISWELL.

1. When a will is shown to have been in the custody of the testator and is not found at his death, the presumption is that he destroyed it.
2. But this presumption may be rebutted by evidence, and testator's subsequent declarations are admissible to show the contrary.
3. When the evidence showed that testator, after making his will, frequently spoke of its contents, and gave his reasons for making it; that he was in the same state of mind five days before he died, which was twenty-seven days before it was claimed the will was destroyed; and the circumstances showed that he was too ill to have destroyed his will on the day alleged, and there was no claim that he made any other will. Held, that a copy of the will was entitled to probate.

William Wiswell, Jr., represents that he is the son of Wm. Wiswell, who departed this life on the twenty-ninth day of May, 1885; that said William Wiswell left three children, to-wit: Sarah M. Lewis, George

W. Wiswell and the petitioner, who would be his only heirs at law if he had died intestate; that William Wiswell did not die intestate, but on the contrary, left a will which was duly executed by him on the first day of January, 1879, a copy of which is attached to the petition.

He further alleges that the will was not revoked during the lifetime of said William Wiswell, and he prays the court to establish the contents of the will and admit it to probate and record.

This application is resisted by Sarah M. Lewis and George W. Wiswell, on the ground that William Wiswell on the night of April 27, 1885, destroyed his will, and died intestate.

GOEBEL, J.

It is an undisputed fact that William Wiswell made a will; that the copy attached to the petition is a true and correct copy; that the will was in existence and in the custody of William Wiswell up to the twenty-seventh day of April, 1885. After his death, a search having been made for the will, it could not be found.

It is well settled as a principle of law that where a will is shown to have been in the custody of a testator and is not found at his death, the presumption is that the testator himself destroyed it, it being a presumption of fact which may be rebutted by evidence leading to the conclusion that the testator did not do that, which in the absence of evidence to the contrary, it is presumed he had done. Whether it is probable that William Wiswell destroyed his will may depend to a great extent upon what was contained in the will.

From the evidence it appears that William Wiswell, Jr., was for many years associated with his father in business, had his confidence and respect; that his son George was a spendthrift, and had been a source of great annoyance to him; that he had advanced to him, from time to time, money which, in the aggregate, would exceed his share of the estate; that his daughter Mrs. Lewis was well provided for, had more than he had, and, at the time the will was made, he had not been on friendly terms with her. To this I attach no significance, for at the time of his death and for several years prior thereto, they were on good terms.

The motive which prompted him to make a will in the manner he did is evident; at any rate, he had a right to act upon his own view of what was right and proper.

Is it probable that he would at some subsequent time change his mind? From the evidence it appears that after the making of the will, he frequently spoke of its contents, and gave his reason for making such will, and he evidently was in the same state of mind five days before he died, which was about twenty-seven days before it is claimed the will was destroyed by him. For on that occasion he spoke to Mr. Wright, saying he had made a will and had left "things" to William. Now, since it is not claimed that he had made any other will, it is evident that he had reference to the will made January, 1879.

Is it possible that he would say to Wright that he had made his will and left "things" to William, when he knew twenty-seven days before that he had destroyed it? What motive prompted William Wiswell to say that, when he knew it was not true? Wright had no interest in the matter.

It seems to me that he would not have concealed the fact that he had destroyed the will, and kept up the pretence of having given every-

In re will of Wiswell.

thing to William, which is inconsistent with the idea that he had changed his mind.

But aside from this, was it possible for William Wiswell to have destroyed his will on the night of the twenty-seventh day of April, 1885? In the afternoon of that day, he was taken ill at his store and removed to his house, and occupied a room on the lower floor, being too ill to go upstairs. Dr. Craik came and prescribed for him. He occupied that room until about 6 o'clock, when Mr. Smith came and assisted him up stairs and put him to bed. Smith remained with him until 7:30 or 8 o'clock, and left him apparently asleep.

Dr. Craik called again and found him somewhat quiet. He had previously been in great pain and was very weak and feeble, so much so that at times he could not be understood, and spoke with great effort. In this condition we find him during that part of the evening in which it is alleged he destroyed his will.

Mrs. Wilson testifies that between 7 and 9 o'clock on that evening he requested her to get his will, which she found in his secretary on the lower floor; that he read to her the contents of the will, said it was unjust and asked for a light and burned it; then handed her a general copy of the will, told her to keep it until he was better and then he would write another.

The conduct of this witness during the time a search was made for this will, her contradictory statements throughout her testimony, standing alone as a witness to the destruction of the will, when every circumstance points to testator's inability to destroy it in the manner it is claimed he did, justifies me in saying that no reliance can be placed on her testimony, and it must be wholly disregarded. I have not deemed it necessary to go into the details of her testimony and point out the many inconsistent statements therein, nor am I called upon to suggest any theory which would account for the will not being found at the testator's death. One might be suggested.

It is sufficient for me to say and I so find, that Wm. Wiswell made a will on the first day of January, 1879, and that the contents of the will were as set out in the petition, and that he had not revoked it at any time when he had the opportunity.

Howard Douglass and Charles Edgar Brown, for the will.

Kebler & Roelker, *contra*.

ASSIGNMENTS—LIENS.

[Hamilton Probate Court, December 8, 1886]

***IN RE ASSIGNMENT OF A. L. HOBELMAN.**

1. A claim due for labor performed three months prior to an assignment is not superior to the lien of a previously executed chattel mortgage.
2. The clause in sec. 3206a, Rev. Stat., providing that such claims have preference over all others, applies to liens on a trust fund, whether such fund is realized from the sale of real or personal property.

The case was submitted on an agreed statement of facts: from which it appears that on January 26, 1886, A. L. Hobelman assigned his

*This judgment was reversed by the Hamilton Common Pleas but affirmed by the Circuit Court.

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property to John K. Love, for the benefit of his creditors, without preferences. Among other debts Hobelman owed George Fagan and Lawrence Kirk for services rendered during the three months next preceding the assignment.

On the twenty-third day of December, 1883, Hobelman being indebted to the Moerlein Brewing Company, in the sum of \$1,500, executed and delivered to it a chattel mortgage on the goods and chattels subsequently assigned. The property was afterwards sold by the assignee, by the order of the probate court, which now holds the proceeds for distribution.

It is claimed by Fagan and Kirk, that they have a superior lien for their debt upon the property covered by the mortgage of the Moerlein Brewing Co., and subsequently assigned, under sec. 3206a of the Rev. Stat.

It is contended on behalf of the Moerlein Brewing Company:

First—That sec. 3206a applies only to real estate.

Second—That the parties have waived their lien by not filing an itemized statement, duly verified, within thirty days from the expiration of the three months, as provided for by said act.

Third—That said act is in conflict with art. second, sec. 28 of the constitution, and therefore void.

GOEBEL, J.

The General Assembly, on the eighteenth of April, 1883, enacted sec. 3206a, which reads as follows:

"Laborers and employees of any persons, association of persons, or corporations, whether such employment be at agriculture, mining, manufacture or other manual labor, shall have a lien upon the real property of their employers for their wages, which is hereby declared to be superior to the following liens taken or attaching during the existence of such unpaid labor claims, to-wit: liens of attachment, liens of mortgage given or taken at a time of actual insolvency of the debtor, or with a view of preferring creditors, or to secure a pre-existing debt, and superior to all claims for homestead or other exemptions, except under section fifty-four hundred and thirty; and in all cases where property of an employer is placed in the hands of an assignee, receiver or trustee, claims due for labor performed within the period of three months prior to the time such assignee, receiver or trustee is appointed, shall be first paid out of the trust fund, in preference to all other claims against such employer, except claims for taxes and the costs of administering the trust. The lien herein provided shall be deemed to be waived by the laborer or employee as to any portion of such labor, unless within thirty days from the expiration of three months from the performance of such portion, he shall file with the recorder of the county where the labor was performed an itemized statement, verified by affidavit, of the amount, kind and value of the labor performed within said period, with all credits and offsets, and the amount then due him therefor, which verified statement, when so filed, shall be recorded in a book kept for the purpose, and shall become and operate as a lien upon the real property of the employer, without any specific description thereof, for the period of one year from and after the filing thereof, and if an action is brought to enforce the lien within that time, it shall continue in force until finally adjudicated; and the proceedings to enforce such lien shall be the same as in other cases of lien, against the owner of the property and all other persons interested; pro-

vided, that if several persons have or obtained liens under the provisions of this section, against the property of the same employer, they shall have no priority among themselves, but all shall be paid *pro rata*, nor shall they have priority over those obtaining liens under sections thirty-one hundred and eighty-four, thirty-one hundred and eighty-five, thirty-one hundred and eighty-six, and thirty-one hundred and eighty-seven of this chapter, but the persons obtaining liens under sections thirty-one hundred and eighty-four, thirty-one hundred and eighty-five, thirty-one hundred and eighty-six and thirty-one hundred and eighty-seven shall have priority as provided therein."

I am of the opinion that the middle clause of this section, upon which Fagan and Kirk rely, and which is as follows:

"And in all cases where property of an employer is placed in the hands of an assignee, receiver or trustee, claims due for labor performed within the period of three months prior to the time such assignee, receiver or trustee is appointed, shall be first paid out of the trust fund, in preference to all other claims against such employer, except claims for taxes and the costs of administering the trust," is so disconnected from the balance of the statute, that if stricken out, that which would remain is complete in itself, and would be capable of being enforced in accordance with the legislative intent. The intention of the legislature was to give to laborers and employees a lien upon the real property of their employers, for their wages, superior to the liens mentioned in said section, and to provide a mode to obtain such lien and for its enforcement. The middle clause of said section, herein referred to, gives to employees, where property of an employer is placed in the hands of an assignee, receiver or trustee, a lien upon the trust fund, in preference to all other claims against such employer, except claims for taxes and the costs of administering the trust, when such claims have accrued during the three months preceding the appointment of such assignee, trustee or receiver.

It is evident that this clause applies to liens on a trust fund, whether such fund was realized from the sale of real or personal property, or from any other source.

There is a wide distinction between the two clauses; not alone as to the lien itself, but also as to the time and priority. If this section is to be considered as a whole, and is given the construction asked for, there would be an inconsistency not warranted by a careful reading of the section. They are not so connected with and dependent on each other as to warrant a belief that the legislature intended them as dependent parts of a whole. Hobelman, by the execution and delivery of the chattel mortgage, transferred and assigned the title to the property to the mortgagee; and it became the general owner of it, subject only to Hobelman's right of redemption. The mortgagee of personal property takes his mortgage subject to the provisions of our assignment laws in force at the time. The assignee was entitled to the property, and the interests of the mortgagee are transferred to the fund, *Lindemann v. Ingham*, 36 O. S., 1. The ruling in this case determines the status of the parties, and leaves no room for holding, that if the mortgagee was the owner and entitled to the property, the assignee had no interest, and there is no trust fund within the meaning of the act. It must follow, that the assignee, being entitled to the property, and having sold it, the money arising from such sale becomes trust funds in his hands, subject

to distribution, after the determination of the priorities of liens by this court.

Have Fagan and Kirk a superior lien to that of the Moerlein Brewing Co.? At the time of the execution and delivery of the chattel mortgage by Hobelman to the company the claim of Fagan and Kirk was not in existence. Again, at the time of the accruing of the claim and lien of Fagan and Kirk, they had knowledge of the existence of the mortgage lien of this company.

But it may be said that at the time of the execution and delivery of this mortgage, the law which gave to employees a lien was in force, and whatever lien or right accrued to this company, was subject to any right or lien of employees that might subsequently accrue. In other words, that it was within the power of Hobelman to defeat an existing lien by incurring subsequent liabilities.

The contract with the mortgagee was, that this property should be liable for the payment of the mortgagor's debt. This contract was entered into prior to the existence of the claim of these employees. Let it be understood that a lien may be defeated by the subsequent conduct of the mortgagor, authorized by law, by incurring subsequent liabilities, and no prudent man will invest; no mortgagee, under such circumstances, would be safe under such a law. In vain would he look to his mortgage, or to the provisions of the existing laws of the state for his security, if that security could, at the pleasure of the mortgagor, acting under authority of law, be impaired. The contract with the mortgagor was that the mortgagee should have a lien. This contract was good in law, and to deprive him of it now, by operation of this section, would be to materially impair the contract; for it is evident that a substantial right is affected by this law. It has the effect of imparting some new stipulations into the contract, or it fails to leave the party a remedy such as was assured to him by the law in force when the contract was made. The legislature did not intend, in the enactment of this law, to affect a subsisting right. Such legislation would be pernicious and against public policy, which alone would be a sufficient reason for preventing its enforcement. But giving this act a proper construction—doing that which would seem to be equitable and just, and considering the object which induced its enactment, I hold that the act does not affect existing liens, but that such employees have a lien on the trust fund superior to any and all subsequent liens, etc.

Whether the middle clause of this section is in conflict with art. 2, sec. 28, of the constitution, which inhibits the passage of laws impairing the obligation of contracts, it is not necessary to determine, in view of the ruling just made. The presumption is in favor of the validity of every act, and no act should be declared unconstitutional until it is clearly shown to be in conflict with the organic law. It should always be the duty of the court to give an act such construction as would carry out the intention and meaning of the legislature.

J. K. Love, for lienholders.

Von Seggern, Phares & De Wald, for Moerlein Brewing Co.

GUARDIANS.

[Hamilton Probate Court, February 28, 1887.]

IN RE ESTATE OF BENJ. KAUFMAN ET AL.

By the terms of a written instrument a mother gave to her minor children a certain sum of money to be held by their guardian as such until they attained majority, and thereafter as trustee until final distribution; said "guardian and trustee" in consideration thereof, to pay to her the interest on the money until the youngest child should attain majority, after which he should pay over the money to each of the children; in the event of a vacancy in the guardianship the successor to succeed the guardian "as said trustee," and hold the money upon the same terms, etc., to be delivered "to said successor in his fiduciary capacity." These terms were accepted in writing by the guardian. The guardian loaned the money to a firm of which he was a member, and afterwards failed in business during the minority of all the children. Before failing, he presented his resignation as guardian, which was accepted, and filed his account claiming to hold said money as trustee. On exceptions to his account filed by his successor: Held, that the guardian received the money as guardian and must account for it as such.

Prior to the nineteenth day of May, 1874, Leopold Rosenfeld was the guardian of Samuel, Benjamin, Milton, and Rose Kaufman, minors, duly appointed by this court, and acted as such until recently, when he resigned. Lottie Kaufman, the mother of these minors, being the owner in her own right of \$10,000, and desiring to give \$5,000 of this money to her four children, entered, on the nineteenth day of May, 1874, into the following agreement with Leopold Rosenfeld:

"Whereas, I, Lottie Kaufman, do now have and possess in my own absolute right the sum of \$10,000, and do now possess the same subject to no provisos or conditions whatsoever. And whereas, I have and hold the same under my sole absolute control and disposition; and whereas, after due deliberation, I have concluded that it is just and meet to give and transfer \$5,000 thereof to my children, Samuel Kaufman, Benj. Kaufman, Milton Kaufman, and Rosa Grace Kaufman—that is to say, to each of them \$1,250; therefore, in consideration of the premises, and in further consideration of the acceptance of the said \$5,000 for said children by Mr. Leopold Rosenfeld, their guardian, upon the terms hereinafter set forth, do I, Lottie Kaufman, voluntarily and of my own free will, give and transfer unto my said children \$1,250 each—that is to say, in all, the sum of \$5,000, upon the following terms, to wit: That said Leopold Rosenfeld shall hold said money and have the same under his control in his office as guardian, as to the share of each of my said children, until he or she shall attain majority, and thence thereafter until the final distribution of said money, as hereinafter provided for, as trustee for each of them, and further, that said Leopold Rosenfeld, as guardian and trustee, in consideration of this gift, shall pay and deliver to me all the profits and fruit of the said money obtained by him, by way of interest thereon, until the one of my said children which shall become of age last shall have attained majority, when said Leopold Rosenfeld shall be authorized, and is hereby authorized, to give and transfer to each of my said children, who shall then survive, his or her equal share of said sum. In the event the said guardianship of Leopold Rosenfeld be rendered vacant by any cause whatsoever, the guardian appointed in his stead shall also succeed said Rosenfeld as said trustee, and shall hold said money upon the same terms, and said Rosenfeld shall and is hereby

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authorized so to deliver said money to said successor in his fiduciary capacity. The gift or gifts herein made shall not be regarded as made by way of advancement to my said children. Witness my hand this nineteenth day of May, 1874.

"LOTTIE KAUFMAN.

"I accept the foregoing described money upon the terms and trusts aforesaid.

"LEOPOLD ROSENFELD, Guardian."

In pursuance of this agreement Rosenfeld received the \$5,000 and loaned it to a firm of which he was a member, who opened an account with him as guardian; and this continued so for some years, when he failed in business. Previous to his failure, however, he presented his resignation as guardian, which was duly accepted, and duly filed his account as such, showing a large balance in his hands, excluding the sum of \$5,000. As to this amount, he states in his account that he holds the same as trustee under the agreement. James Levy was subsequently appointed guardian for these minors, and filed exceptions to the account, and to the statement contained therein relating to this amount of \$5,000, and alleges that the said Rosenfeld received said amount as guardian, and that he must account as such.

GOEBEL, J.

Rosenfeld being now insolvent, and the Supreme Court having held in the case of Braiden v. Mercer, 44 O. S., 339, that in an action upon a guardian's bond for the recovery of the amount found due the wards, upon a final settlement of the guardian's accounts in the probate court, the sureties are concluded by the settlement, and will not be heard, in the absence of fraud and collusion, to question its correctness or demand a rehearing of the accounts, the question involved herein becomes a matter of some importance to his sureties, who now appear, resisting the application of the present guardian.

The first question that presents itself is, did Rosenfeld receive this money as guardian, for which he must now account and pay over, as provided by sec. 6269 of the Rev. Stat.? For the solution of this particular question we must look to the agreement. By this agreement \$5,000 was absolutely given to the four children, accepted by Rosenfeld as guardian, to be held and controlled by him in his office as guardian, as to the share of each of said minors, until he or she should attain majority. It will be seen that this agreement is signed by him as guardian; that he treated this money as having been received by him as such, having invested it in his name as guardian; and the evidence is too conclusive to admit of any doubt that he did receive it as such. This question being disposed of, the next question that presents itself is, could he legally, as guardian, enter into such an agreement? I think he could. As guardian it was his duty to receive any and all moneys coming to his ward from any and all sources. If it became necessary, in the receipt of money, to make an agreement with the donor, by which this fund should be held in trust for his wards, but to pay the interest and profits to the donor, then so much of that agreement as relates to the payment of the income and profits was made as trustee and not as guardian, and such agreement being separable from the exercise of his power to receive, can not militate against that power; and he must account in the capacity in which he received it. By this agreement he

is to hold the respective shares of the minors until the youngest shall become of age, and in the meantime as well as during their minority to pay the income to the mother. As the guardianship is co-extensive only with the minority of the ward, it must follow, from the agreement, that he held such share or shares after the termination of the guardianship as trustee.

In the case at bar there were two funds, one the principal and the other the income and profits arising from the principal; the former went to the children, the latter to the mother. The relationship of Rosenfeld to the former was that of guardian, to the latter that of trustee.

Counsel have cited *Quinby v. Walker*, 14 O. S., 193. The principle there determined is, that an administrator can not treat as to property unless it came into his hands as administrator, and is assets in his hands, belonging to the estate. In the particular case the bonds were not received by Scott in the discharge of his duties as administrator, but came to him by virtue of an agreement of the widow and heirs on the one hand and the purchaser on the other, and he became trustee. The converse of this must be equally true, that if the property was assets of the estate, notwithstanding the agreement, he would hold such assets as administrator and be liable as such. Apply this principle to the case at bar, and we find that this money was the absolute property of these children, which could not have gone into any other hands but the guardian's. That being the legal status of the parties, the agreement did neither contract nor enlarge the powers conferred by law.

I am also cited to the case of *Hindman v. State of Maryland*, 61 Md., 471. The controlling question in that case was whether an executor, under a will, in respect to a legacy of four hundred dollars bequeathed to a minor, to be paid to him on his attaining the age of twenty-one years, the interest in the meantime to be paid to two other parties, could legally pay the *corpus* to a guardian, for which, in default of payment by such guardian, his bondsmen would be liable; and it was held that no special direction being given by the testator as to who should invest the fund, it was the plain duty of the executors and no one else. It followed by necessary implication, as one of the duties of their office, and they could not divest themselves of it while holding their respective relations to the estate, and the executors not having power to shift their responsibility, or to transfer this fund upon the same trusts, and the guardian not having power to receive it, his sureties would not be liable for his default. But it does not follow that if the testator had imposed upon the guardian this power, or had failed to bequeath the interest, and such executor should have paid the *corpus* to the guardian, that the sureties would not be liable on the bond of such guardian; and this view is strengthened by the case of *Gunther and Canfield v. The State of Maryland*, 31 Md., 21. In that case the legacy was to be paid to the legatee in case he attained the age of twenty-one years. In the meantime the interest was not bequeathed, and the executor having paid such legacy to the guardian, and the guardian having defaulted, the court held that the payment to the guardian was legal.

From these cases it must also follow that a guardian may hold the *corpus* as guardian and become trustee as to the interest. These children being still minors, and their estate being still under the control and direction of this court, and the court having found that the guardian duly received the money as such, an order will now be made directing

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said Leopold Rosenfeld to account, as the late guardian, for said sum of \$5,000, and ordering him to pay the same to the present guardian.

Judge Jacob Shroder and B. Bettman, Jr., for James Levy, Guardian.

Kramer & Kramer and Wilby & Wald for sureties.

NOTE.—The judgment in this case was reversed by the Hamilton Common Pleas and affirmed by the Circuit Court, First Circuit No. 602. *In re estate Benjamin Kaufman et al.*, unreported.

SETTLEMENT OF ESTATES.

[Hamilton Probate Court, June 20, 1887.]

IN RE ESTATE OF E. S. TURPIN.

1. Claims of administrators for moneys paid for taxes and repairs of real estate of intestate, and for labor in gathering crops after his death, are valid debts of the estate, and they are entitled to a credit therefor.
2. A claim for money deposited with intestate for safe keeping in his life time, held under the circumstances of the case a valid debt of the estate.

EXCEPTIONS to the account of administrators.

GOEBEL, J.

J. M. Miller, as guardian of Ida Bell Turpin, files exceptions to sixty-two items of the account of the administrators filed herein, alleging that the various amounts paid by the administrators were paid without authority of law, and that the claims paid were not debts of the estate. The majority of these items refer to rents collected and payment of taxes, and for repairs made on the several pieces of real estate of which E. S. Turpin died seized. It appears from the testimony that E. S. Turpin died in September, 1879; that E. K. and Phil T. Turpin were shortly thereafter appointed administrators; that part of the real estate was partitioned in 1881; that from September, 1879, to 1881 these administrators collected the rents, paid the taxes, and made all repairs. In 1884 they filed an account, charging themselves with the rents so collected and crediting themselves with the amounts paid for taxes and repairs on such real estate. No exceptions are taken by the guardian to the items by which these administrators are charged with rents collected; and as these administrators have seen fit to charge themselves with the rents, this court is not called upon to consider the question whether an administrator has authority to collect rents. But if called upon it would adhere to the ruling made in the case of *Campbell v. McCormick*, Admr., etc. which was affirmed by the circuit court. Same case, 1 Circuit Court Reports, 504.

The evidence and circumstances are much stronger in this case for upholding the ruling made in the case of *Campbell v. McCormick*. The administrators having charged themselves with the rents, are they entitled to a credit for taxes and repairs? I think they are. To hold otherwise would be inconsistent with the decisions rendered, where administrators having taken possession of real estate other than that set apart for the payment of debts, collected the rents, accounted for them, and applied them to the discharge of debts due from the estate, were

held entitled to a credit. I see no distinction between the cases where an administrator paid the debts with such rents or applied them to taxes and repairs. Certainly no injustice can be done to the exceptor, since no complaint is made as to the amounts paid, and since the payment of taxes and making repairs were for the preservation of the property by which this minor benefited, the guardian has no reason now to complain.

Voucher eighteen shows an amount paid for beef from January 1, 1879, to January 1, 1880, and so much of this amount as may be shown to have been paid for beef delivered after September 15, 1889, will be disallowed. To that extent this claim is not a debt of the estate.

The administrators, by voucher nineteen, credit themselves with the payment of \$2,493.45 to A. M. Turpin. From the evidence it appears that A. M. Turpin is the widow of the decedent; that the appraisers appraised the personal property of the decedent at \$2,493.45; that they set off to her for her year's allowance \$2,000; and that subsequently she took the personal property at the appraisal, and gave her receipt for the full amount of the appraisal. As she was entitled to \$2,000, this amount will be applied to the payment to her for the personal property; the administrators will be charged with the difference, to-wit: \$493.45, and this sum will be disallowed as a credit.

Vouchers Nos. 24, 25, 26, 27, 28 and 29 show payments to various persons for labor performed after the death of E. S. Turpin. From the testimony it appears that Mr. Turpin was a farmer; that after his death, in September, 1879, labor was employed to gather the growing crops, all of which was necessary for the preservation of the same; that the crops were afterward sold by the administrators, for which they have accounted, and that the heirs received the benefits of the same. The costs and expenses for gathering such crops are proper items, and the administrators are entitled to a credit. The exceptions to these items will be overruled.

Voucher No. 46 shows a payment to J. L. Hosbrook for making a survey in the year 1875. The evidence shows this to be a debt against the estate. The item is allowed and the exception to the same is overruled.

The next and most important exception to consider is item No. 72, being the sum of \$5,150 paid to M. P. Hess. This item is made up of notes. It appears from the testimony that the decedent, in the latter years of his life, was, to a great extent, unable to attend to business; that he was also the owner of large farms; that for many years preceding his death and during his illness, and up to the time of his death, Estes was assisting him in the management of his affairs; that Hess, who was born and raised in the immediate neighborhood of the decedent, confiding and having implicit confidence in the honesty and integrity of the decedent, came to an understanding with the decedent that such money as he might from time to time earn was to be deposited and kept for safekeeping without interest, and subject to call at any time; that in pursuance of this understanding he gave to Estes, except on one occasion, money, for which he received the notes on file, except the note dated the — day of —, 18—, being the note dated after the death of Turpin. The testimony also shows that Estes had full knowledge of the understanding between Hess and the decedent, and was acting in relation thereto with the full knowledge and consent of the decedent. It is contended that the claim of Hess is not a valid claim against this estate.

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In the determination of this question it is not necessary to consider whose debt it is, if it is not the debt of this estate, and in determining that question I have placed Hess in the attitude of a plaintiff seeking now to recover from this estate the amounts due him by virtue of this agreement, ignoring for the time being the fact that the claim was allowed by the administrators and paid by them. In that attitude the rule of evidence must be applied to him as in any other case, namely, that he must satisfy the court, by a fair preponderance of the evidence, that he is entitled to this money. In pursuing this course, it was incumbent upon him to show that he did in fact deposit this money with the decedent. He offered himself as a witness; and I desire to say that his testimony is strong and convincing, and stands uncontradicted, and supported by other testimony. No testimony was offered to disprove anything that Hess said, and nothing can be inferred to the contrary, except that these notes were signed by Estes, and on their face they appear as promissory notes, for money loaned Estes. Yet, as I have said, his testimony was so clear and his explanation so satisfactory, and supported, too, by other evidence and circumstances, that to hold otherwise would be to disregard all of the testimony and consider it unworthy of belief. Whatever Hess's motive might have been in leaving this money on deposit without interest, and not making a demand for it until long after the death of E. S. Turpin, cannot be considered in upholding a theory unsupported by evidence that Hess never in fact deposited the money; nor can his motive have any effect upon the question involved. I am satisfied from the evidence before me that he deposited this money with E. S. Turpin; that the estate is justly indebted to him in that amount; and that the administrators, having allowed and paid the same, are entitled to a credit therefor. The exception will be overruled.

John Coffey and William E. Jones, for administrator.

C. H. Blackburn and West & Clevinger, for guardian.

ADMINISTRATORS' COMMISSIONS.

[Hamilton Probate Court, October 12, 1887.]

IN RE ESTATE OF JOHN DUDDY.

1. An administrator is entitled to his statutory commissions upon certificates of stock which came into his hands as assets of the estate, remained there until final distribution, and were turned over by him to the widow as sole legatee.
2. The risk and care attendant upon the custody of such certificates cannot be considered as "extraordinary services" within the meaning of the statute, and allowed for as such.

This case was submitted upon an agreed statement of facts, from which it appears that John Duddy in his lifetime was the owner of two certificates of stock in the Metropolitan National Bank, one for \$10,000 and one for \$5,000, par value. This stock passed into the hands of the administrator, and remained there until the final distribution, when the two certificates were turned over to the widow, she being the sole legatee. GOEBEL, J.

The question now arises as to whether the administrator is entitled to his statutory commissions upon the two certificates.

Section 6188, of the Rev. Stat., provides that executors and administrators may be allowed commissions upon the amount of the personal estate collected and accounted for by them.

It was held in New York, under a statute somewhat similar to ours, that the statute of that state did not design to limit commissions to the mere money received. *Cairns v. Chaubert*, 9 Paige, 160.

The court, in the case of *Pomeroy v. Mills*, 37 N. J. Eq., 578, in commenting on a statute similar to that of the state of New York, say: "So to interpret it would often constrain these officers to do what would be for the disadvantage of those whose interests were intrusted to them, to convert into cash what could easily be divided and might better be preserved *in specie*, or else abandon all right to compensation for service rendered and risk incurred. * * * Commissions may be allowed upon any personal property that comes to hand having a money value."

Sums received and paid out are made the basis of computation in New York. It has nevertheless been held that securities received by an executor and by him turned over to the parties entitled thereto, ought to be treated as money received and paid out, for the purpose of computing commissions. This adds an extension to the authority of the statute, justified by the consideration that what was accepted as money by the parties interested might well be treated as such, for the purpose of computation. *Phoenix v. Livingston*, 4 Eastern Reporter, 407.

I fully concur in the opinions expressed in the cases to which I have referred, and it would seem but right and proper that where an administrator has received, in the due course of his administration, securities which to all intents and purposes must be considered, and are treated, as in this case, as money, with the responsibility attached to the taking care, the risks incurred, the court would be justified in construing the section referred to, to apply to a case of this kind.

It is claimed, however, that the court might consider the risks and the care as part of extraordinary services rendered and allow for such extraordinary services as provided by statute. I can not agree with counsel upon this proposition, inasmuch as the stock which came into the hands of the administrator, was by him received in the due course of administration, and such stock having a money value, was in every respect assets as any other assets, upon which in law he was bound to administer. In that respect there were no extraordinary services rendered, at least not such as are contemplated by statute, for which an extra allowance might be made.

I have not been able to find any decisions in Ohio upon the question involved in this case, except the case of *Stone v. Strong*, 42 O. S., 53, where a judgment creditor accepted in lieu of money the purchaser's note and mortgage on the land sold by the administrator. It was there held that it was equivalent to the administrator receiving the money, and must be considered as a part of the proceeds of the sale, and administered upon by the administrator, for which he was entitled to his statutory commissions as provided by sec. 6188, Rev. Stat.

This would seem to indicate that it was not necessary, before an administrator would be entitled to his commissions, that the amount should have actually passed through his hands, but that for administering upon anything having a money value, upon which commissions might be computed, such administrator is entitled to his commissions.

An order will be made in this case allowing the administrator his statutory commissions upon this stock.

Paxton & Warrington, for administrators.

Ferris & Wilder, for heirs.

CURTESY.

[Hamilton Probate Court, December 15, 1887.]

ANNA FIRMAN V. HENRY J. GERHOLD ET AL.

A surviving husband can not resist the sale of real estate of his deceased wife to pay debts, subject to his curtesy, on the ground that certain claims against the estate are invalid. His interest is not affected by their allowance or rejection.

The plaintiff, as administratrix *de bonis non* with the will annexed of Mary M. Gerhold, deceased, filed her petition in this court alleging that there are debts of said estate; that there is no personal property to pay the same, and that it is therefore necessary to sell the real estate, of which Mary M. Gerhold died seized, to satisfy such debts.

To this petition, among other defendants, Henry J. Gerhold, the surviving husband of Mary M. Gerhold, was made a defendant. The petition further alleges that Henry J. Gerhold is entitled to curtesy, and prays that said real estate may be sold subject to such curtesy. Henry J. Gerhold files an answer setting up eight defenses, and prays that the petition be dismissed.

GOEBEL, J.

It is immaterial, by reason of the conclusion to which the court has come, to consider all of the reasons set forth in the answer, except the one, Is the plaintiff entitled to the order prayed for? Section 6141, Rev. Stat., provides that the petition of an administrator for the sale of real estate shall set forth the amount of debts due from the deceased, the amount of charges of administration, the value of the personal estate and effects, and a description of the real estate and the value thereof, if appraised.

It was never contemplated by section 6141 that the probate court should determine what are debts. The statute says that the debts shall be set forth in the petition; it means such debts as have been ascertained as being debts, either by the administrator or by adjudication. It may be said that this would give an extraordinary power in an administrator to accept claims, and thereby undue advantage might be taken against the heir or other person who might be affected by such allowance.

But the legislature has afforded ample protection by sec. 6098, Rev. Stat., which provides in substance that any creditor of a deceased person, or any person who has purchased or claims to hold, by purchase or otherwise, from such heir, any land or other property inherited from such decedent, may file in the probate court in the county in which administration is taken on any estate, a written requisition on the administrator or executor to disallow and reject any claim presented for allowance, and that, too, when such claim has been allowed, but which has not been paid in full.

And it further provides that upon such rejection, the party holding such claim shall institute a proceeding to have his claim determined. And this section further provides, that if a proceeding shall have been determined to sell the lands of the decedent to pay such claim, such proceedings shall be stopped, and no further order or decree shall be taken therein until after the validity of such claim shall have been determined.

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It must be apparent that this court has no jurisdiction to determine as between Gerhold and these creditors, or between the administratrix and these creditors, or between the heirs and these creditors, whether such claims are valid and subsisting claims against the estate.

The allegations of the petition, therefore, must be considered as true. The remedy of such heir or person interested is by filing his requisition to disallow the claims; and when that is done the proceedings must stop until such claims have been adjudicated by the proper tribunal.

But were we mistaken as to this proposition, namely, that this court has a right to determine the validity of these claims, we should hold that the right to contest such claims does not devolve upon a party who would in no instance be affected by such determination. Gerhold is not an heir, creditor, or a person who has purchased from an heir the real estate sought to be sold, as provided by sec. 6098, Rev. Stat.

In this case Henry J. Gerhold is the surviving husband entitled to curtesy. It is not sought to sell the property free of his curtesy, or deprive him of any of his rights as such surviving husband. On the contrary, the plaintiff prays that the property may be sold subject to his curtesy. He is not here consenting to such sale.

There is no power in this court to sell the property free of his curtesy, against his will, and hence when the court orders the property sold subject to his curtesy, he loses nothing by reason thereof.

For the reasons given the administrator is entitled to an order of sale.

John B. Boutet, for plaintiff.

H. J. Harrop, *contra*.

ADMINISTRATOR'S FEES.

IN RE ISAAC F. WARING.

[Hamilton Probate Court, December 16, 1887.]

Where an administrator has charged the statutory allowance of six per cent. on the first thousand dollars collected by him, and four per cent. on the next four thousand, an administrator *de bonis non*, who succeeds him, can only charge the percentage his predecessor could have charged upon money subsequently collected, viz., two per cent.

THE facts are stated in the opinion.

GORBEL, J.

This cause is submitted to me upon exceptions to two accounts. The principal exceptions are to attorneys' fees, allowance for extraordinary services to the administrator, and statutory allowance to the administrator *de bonis non*.

Upon full consideration I do not think that the attorneys' fees or the allowance for extraordinary services made to the administrator are excessive. The exceptions to these items will be overruled.

The administrator *de bonis non*, in his account filed, charges himself with the amount received from the administrator of the former administrator of this estate, and in addition thereto the account shows that he collected about nine hundred dollars. Upon these amounts he has

charged the statutory allowance, namely, six per cent. on the first thousand, and four per cent. upon the next four thousand. This he is clearly not entitled to. Where an administrator has once charged the statutory allowance and is succeeded by an administrator *de bonis non*, such administrator *de bonis non* is not entitled to again charge upon an amount which had already been subjected to a charge, six per cent. upon the first thousand, four per cent. upon the next four thousand, and two per cent. upon any balance; but may charge the percentage that the preceding administrator may or could have charged upon money subsequently collected.

To this extent the exception will be sustained, and the administrator *de bonis non* will be entitled to charge two per cent. upon the money which came into his hands since the death of the former administrator.

I am reminded by counsel that sec. 6188 of the Rev. Stat. makes no distinction between an administrator and an administrator *de bonis non* in fixing their statutory compensation. It is true that the statute does not say an administrator *de bonis non* shall or shall not receive the percentage. The statute, however, says that six per cent. shall be allowed upon the first thousand, four per cent. upon the next four, and two per cent. upon the balance. That clearly means it shall be once allowed, and not allowed to every succeeding administrator, for otherwise you are subjecting an estate to two or more commissions, depending altogether upon the number of persons called upon to administer, and thereby permitting a greater percentage to be paid than the law would have authorized had there been but one administrator. In contemplation of law there is but one estate, although there may be more than one administrator. In this case the administrator *de bonis non* received a large amount from the former administrator, upon which had been charged the statutory commissions. While there is a responsibility in receiving and paying this money by the administrator *de bonis non*, for which the court may make an allowance, I am clearly of the opinion that the statutory commissions can not be again charged upon this amount.

Noyes & Fitzgerald, for administrator.

James T. Demar, *contra*.

PARTNERSHIPS—EXECUTORS—PLEADING— LIMITATIONS.

[Hamilton Common Pleas.]

WILLIAM P. JONES ET AL. V. WILLIAM P. PROCTER ET AL.

1. A partnership agreement provided that in case of the death of one of the partners, "the surviving partners shall take as purchasers" his share, its value to be ascertained by appraisement. One of the partners died and an appraisement was had. A petition is filed by the children of the beneficiary under the will of the deceased partner, alleging fraud and collusion between the surviving partners and the executors of the deceased partner, resulting in a fraudulent appraisement. The petition asks that the appraisement be set aside, and that an accounting of the partnership assets be had, and that the executors account for the value of the deceased partner's interest. Upon demurrer to the petition, it was Held :
- 2a. By virtue of the above clause in the partnership agreement, the title to the deceased partner's assets vested absolutely in the surviving partners, the appraisement not being a condition precedent to the vesting of the title.

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- 3b. The only claim against the partners was for the price of these assets—a debt—and they held no fund or property in trust for the beneficiaries, and so were under no obligation to account.
- 4c. The debt owing from the surviving partners could only be recovered in a suit by duly constituted representatives of the deceased partner, and not by his beneficiaries, the plaintiffs.
- 5d. No right of action because of the fraudulent appraisalment would accrue against one becoming a partner subsequent to such appraisalment.
- 6e. The obligation of the executors is to respond to the fair purchase price of the assets, owing to maladministration—fraud—in not obtaining it.
- 7f. Inasmuch as the obligation of the partners to pay the purchase price arises out of the partnership agreement; and the obligation of the executors arises out of fraud, therefore, the petition states a misjoinder of causes of action.
- 8g. The right against the executors arising not out of what they have received, but out of collusion in a fraudulent appraisalment, and not having received any trust funds, they are not liable to an accounting.
- 9h. The action against the executors being based on fraud, is barred in four years, and is not within the ten year provision of sec. 4985, Rev. Stat.
- 10i. The executors being made parties defendant by amendment to the petition, at a date more than four years subsequent to the perpetration of the fraud: Held, that the action as to them is barred, though the original petition against the partners was filed within the four years.
- 11j. The allegation of expenditures of large sums, out of the partnership funds shortly before the time for the appraisalment, though such expenditures were thoroughly legitimate in the carrying on of the business, is an immaterial fact, and will, on motion, be stricken from the petition.
- 12k. The remedy, if the appraisalment was fraudulent, is either a re-appraisalment, if such can be had, or the ascertainment of the proper sum by a judicial tribunal.
- 13l. A combination between surviving partners and executors to the end of affecting a fraudulent appraisalment of the deceased partner's share, cannot abrogate the obligations created by the partnership agreement, and cannot release surviving partners from the necessity of taking the assets as purchasers, and cannot create in representatives or beneficiaries of the deceased partner any right or interest in the partnership assets.

WRIGHT, J.

Upon July 1, 1879, an agreement of partnership was entered into between William Procter, James Gamble, William A. Procter and James N. Gamble, providing that the partnership business should continue for three years; upon January 1, 1880, Harley T. Procter was admitted to the partnership for the remainder of the original term. Upon June 30, 1882, David B. Gamble was admitted for the period of one year, and an agreement made re-affirming the original articles, and providing that the business should be continued for a second term of three years, from July 1, 1882. By the original articles it was provided that: "In case of the death of one of said senior members (William Procter and David Gamble) of said partnership within said term of three years * * * (his) interest shall be ascertained in the following manner, viz.: three appraisers shall be selected as follows: one by the personal representatives of the deceased, one by the surviving partners, and the two so selected shall select a third; and the three so selected shall make out in duplicate a full inventory and appraisalment of the entire assets and liabilities of the partnership * * *, and the surviving partners shall take as purchasers all said assets at such appraised value thereof, first deducting therefrom the debts and liabilities of the firm * * * and for the value of such deceased partner's share or interest in such net assets thus ascertained, the survivors as a firm, shall give their five

promissory notes, each for one-fifth of such value, and payable respectively, etc."

Upon April 1, 1884, William Procter died testate. His will designated William A. Procter, James N. Gamble and John Morrison, executors and trustees. Upon April 1, 1887, it was undertaken by the executors of the estate of William Procter and by the surviving partners, to liquidate the partnership interest possessed by the estate of William Procter, and this in the manner provided for by the partnership articles.

The petition avers that the appraisement and valuation had was a fraud upon the beneficiaries of William Procter's estate; a fraud participated in by the executors and by the surviving partners as well; that immediately after the completion of the appraisement and valuation, the surviving partners and William Cooper Procter, entered into a contract whereby the latter was admitted to the firm; that each had, at the time of the making of the contract, full knowledge of the fraud of the appraisement; that they continued the operation of the business until 1890, at which time they disposed of it by sale.

James Gamble died May 16, 1891. James N. Gamble, David B. Gamble and William A. Gamble being now executors of his estate. The widow of William Procter died July, 1893. The Central Trust and Safe Deposit Company is now trustee under the will of William Procter, vice William A. Procter, James N. Gamble and Thomas Morrison, resigned. William Procter's daughter (deceased) was beneficiary under his will. This action is brought by her children, the administratrix of a certain one of them being joined as plaintiff. The prayer of the amended petition is for the setting aside of the appraisement, an accounting against the surviving partners, the executors of the estate of James Gamble, and William Cooper Procter, for all moneys and securities received out of the assets of the partnership belonging to the estate of William Procter, "from his death up to the present time;" and amongst other prayers, one for judgment "for any sum which has been so wrongfully withheld." By amendment of the amended petition it is averred, that William P. Jones, and Edith Jones (parties plaintiff) were born, the former upon November 7, 1869, and the latter upon July 31, 1873; that none of the parties plaintiff had any knowledge about the matters of fraud complained of, until within four years from the commencement of the action. The amendment to the amendment, makes William A. Procter and James N. Gamble, executors of the estate of William Procter, as such, parties defendant, averring maladministration and praying: "That an account be stated with said executors of the value of said interest, and a decree be awarded to these plaintiffs, for the full value of their interest therein against the said executors, etc." William A. Procter, James N. Gamble, David B. Gamble, and William Cooper Procter demur, each upon four grounds, as follows: First, that several causes of action are improperly joined; second, that separate causes of action against several defendants are improperly joined; third, that said amended petition, as amended, does not state facts sufficient to constitute a cause of action; fourth, that in the amendment to the amended petition, there is a misjoinder of parties plaintiff.

There have been heard some very elaborate arguments based upon the premise that a fund is held by certain of the defendants in trust for the beneficiaries, under William Procter's will. A trust fund could have arisen only after an appraisement and after somebody had received the

purchase price; and could have no existence save by virtue of the execution of the appraisement, and for the following reasons: The method for liquidation of William Procter's interest was not left to haphazard, but was definitely set down in the partnership articles; it was provided that in case of the death of a senior member, a settlement should be made at a certain time thereafter by appraisement; and that "the surviving partners shall take as purchasers all said assets at such appraised value;" and this whether or no; there was left to be exercised upon these points no option by any one at all. I am not in any doubt about this proposition; that is to say, if a certain sum of money had been ascertained, agreed upon and set down in the articles as the purchase price to be paid by the survivors, that then, upon the arrival of the time fixed for settlement, title to the assets would have at once vested in the survivors, and the assets would have passed into their ownership unincumbered by, and uncharged with any right or beneficial interest of William Procter's estate; the right of that estate would have been, not a right in, or against assets, but the right to collect from surviving partners the certain sum of money which had been agreed upon as the purchase price; an action of debt. Now, while there is no mention in the articles of an ascertained sum of money to be paid in purchase, yet there is set forth in the articles the method whereby the amount of the purchase price shall be ascertained; that is to say, by an appraisement; the vesting of the title in the survivors is not dependent upon the appraisement, but I take it would have transpired even though no appraisement had been attempted; an appraisement is a mere incident to the ascertainment of the purchase price, but is in no wise a condition precedent to the vesting of title in the survivors. It seems to me, that when the time for settlement arrived, the proprietary title to the assets vested absolutely in the surviving partners; it is so written in the articles; and further, it seems to me that the amount of the purchase price to be paid by them remained was to be ascertained in the manner provided for; I must say this; that, however it was prior to the time for settlement, yet when the time for settlement had arrived, and thereafter, the surviving partners were no trustees for the estate of William Procter in their holding of partnership assets, but each held *sui juris*, compelled thereto by the terms of the partnership contract. Therefore, to the extent that after the appraisement they held assets which had formerly been of the firm, the surviving partners were in no sense holding a trust fund, were in no wise holding a fund wherein the estate of William Procter had any proprietary or beneficial interest, so that as against these surviving partners, the petition discloses no right to an accounting, for it is not shown that they held a trust fund. The executors held no trust fund, for they reduced nothing to possession.

In so far as the executors of William Procter's estate are concerned, it must be said that their liability is either to account for whatever funds have been received by them as executors, or to respond for maladministration in failing to acquire funds which their duty required them to obtain.

The obligation of the partners was to pay to the executors of William Procter's estate the purchase price; if, by reason of fraud in the appraisement the price was not fairly ascertained, the remedy is not against the partners as trustees, for they are not trustees; but is either a re-appraisement, if such can be had, or the ascertainment of the proper sum by a judicial tribunal. The obligation of the executors was to see

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to it that the estate of William Procter realized an adequate and sufficient price from the surviving partners. A combination between surviving partners and executors to the end of effecting a fraudulent appraisalment can not abrogate the obligation created by the partnership articles, can not release surviving partners from the necessity of taking the assets as purchasers, and can not create in representatives or beneficiaries of William Procter's estate any right or interest in the partnership assets. If there was fraud in the appraisalment, the appraisalment would thereby be vitiated, and no more. In such event matters would stand as though no appraisalment had been had; that is to say, the title of the assets vested in the partners, and an obligation upon their part to pay the fair, just purchase price therefor. For this purchase price the partners would have to respond, because they are obligated thereto by the partnership articles. Their obligations in this regard are entirely distinct and severed from the obligations which were upon the executors of William Procter's estate. The executors are liable to be called upon to respond for the amount of the fair purchase price, obligated thereto because of their fiduciary duty to realize it, and because of fraudulent administration in not realizing it. The obligations of the partners arise out of the partnership articles, and not out of the fraud. The obligations of the executors arise because of their fiduciary duty and not out of the partnership articles; so that the cause of action against the surviving partners does not affect the executors, and the cause of action against the executors does not affect the surviving partners, and there is a misjoinder of causes of action.

Wherefore, upon the first and second ground, the demurrer must be sustained.

As has heretofore been said in regard to the surviving partners, the petition discloses only a liability to pay the purchase price; and for a recovery of it, the plaintiffs here, the beneficiaries under William Procter's will can maintain no action against them; such an action can only prevail when instituted by duly constituted representatives of the estate of William Procter. There is, therefore, no cause of action in favor of the plaintiffs, stated against the surviving partners and their demurrers upon the third ground set forth must be sustained.

William Cooper Procter was not, according to the averments in the amended petition, admitted to the partnership until after the time for settlement had arrived, and after an attempted appraisalment; therefore, as against him, there is disclosed no cause of action in favor of the plaintiffs or of any one else; each ground of his demurrer is well taken.

Upon the point of the statute of limitations, I have to say, I am unable to understand how the alleged cause of action against the executors (as such) draws to it the ten years' statute, sec. 4985. It is contended by the learned counsel for the plaintiffs that the construction announced for this section in *Gray v. Kerr*, 46 O. S., 652, is fitting for the case at bar. The case in the book was by one partner against another partner, to obtain a settlement of the accounts of the co-partnership. As has been already determined, there is at bar no right to an accounting against partners shown; the right against them is to recover only the fair purchase price when properly ascertained; and there is shown against the executors (as such) no right to an accounting, for the reason that no trust funds have been received by them; the right against them grows out of, not what they have received, but out of their collu-

sion in a fraudulent appraisalment; out of their mal-performance of fiduciary duties, the nature of the mal-performance being such as to constitute fraud, and the four years' statute governs. Upon this point of the application of the statute of limitation to the cause of action undertaken to be set up against the executors (as such), it is contended by counsel for plaintiffs that the action was begun within three years from the time that Edith Jones (one of the plaintiffs) attained to majority, and that her right being saved, it is saved to all. It is true that Edith Jones came to full age, July 31, 1891, and true, that the action was originally instituted by the filing of a petition upon August 4, 1894; but it was not undertaken to set out in this original petition any cause against the executors (as such); not until the filing of the amendment to the amended petition was it attempted to aver a right of action against the executors; this pleading was filed upon March 29, 1897; that is to say, about six years subsequent to the time when Edith Jones became of age. It appears therefore, from the pleading demurred to, not only that the ground of complaint against the executors is for fraud, but also that the fraud complained of transpired more than four years prior to the commencement of the action upon it. Therefore, the action against the executors (as such) must be said to be barred by the statute of limitation, and their demurrer upon that ground is sustained.

The demurrer of David B. Gamble is sustained, for the reason that the facts stated are not sufficient to constitute a cause of action against him.

It is conceded by counsel for plaintiff, that the personal representative of William P. Jones is not entitled to recover against any of the defendants; the demurrers for misjoinder in making the administratrix of William P. Jones a party plaintiff, are therefore sustained.

Hartley T. Procter moves to strike out from the petition. The motion in its first ground is directed against certain allegations about large expenditures out of partnership profits made by the surviving partners in advertising; whether these expenditures were great or small, they were business ventures of nature thoroughly legitimate; an appropriation by a majority of the partners of a proportion of the partnership earnings for the advancement of the interests of the firm. The fact that within a short time there was to be a liquidation of William Procter's interest, put upon the others no duty of enhancing the value of that interest to the delay or detriment of their own; nor did it oblige them to refrain from a business policy which would have been legitimate had he continued in life. Neither did it deprive them of the right inherent in every commercial combination of men to acquire real estate, and erect thereon a plant capable of answering the needs and requirements of the business enterprise.

The first, second and third grounds of the motion are well taken. The allegations alleged by the fourth ground on the motion are well taken.

It seems to me, that in view of the rulings already announced, there is no reason in requiring the plaintiffs at this time to identify the patents which are alleged to have been omitted from the appraisalment.

The motion to make definite and certain is overruled.

MECHANICS' LIEN—EXEMPTIONS.

[Clark Probate Court.]

ALBERT H. KUNKLE, ASSIGNEE, V. CHARLES A. REHSER.

1. A divorced man is a "widower" within the true spirit and meaning of secs. 5435 and 5441, Rev. Stat., and is entitled to the exemptions therein provided for.
2. If the property of the assignor consists, either of, first, personal property; or, second, real estate not occupied as a homestead; or, third, real estate occupied as a homestead, but not incumbered by lien, so as to preclude the allowance of a homestead therein: *Held*, that the right of the assignor to his exemptions rests upon the facts existing at the time of the assignment, and the fact that the assignor was a "widower living with an unmarried minor son," at the time of the assignment, but has since remarried, will not destroy his right.
3. If the property of the assignor consists of real estate charged with liens, some of which preclude the allowance of a homestead, while others do not, the right of the assignor to his exemptions rests upon the facts existing at the time the fund is finally disposed of.
4. Where a material man furnishes suitable material to a person, who, to his knowledge, is erecting a building, the law presumes that the materials are furnished for that building and so accepted by the purchaser, and likewise it will presume that the material man intends to retain the right the law gives him to collect payment for the materials furnished by him; and in the absence of an agreement not to assert the right to a lien, or facts showing a waiver of such right, such right exists though the personal responsibility of the purchaser was largely relied on for payment by the material man.
5. The lien will, however, extend only to those items furnished under the contract, which are suitable for the building.
6. In order to constitute a "continuing," "subsisting," or "entire" contract, within the meaning of the lien law, there must be something more than mere knowledge that a building is being erected, and the supplying of orders for suitable materials.
7. If there was anything from which an understanding might be inferred that one order would be followed by another until the work was done, or the building completed, it might be held that the contract was of sufficient entirety, so that the last item would save the first.
8. The mere fact that notes were given for the amount due, it not appearing that the account was balanced, or that the notes were given and accepted in payment of the amount due, will not deprive the creditor of his right to assert a lien.
9. The fact that such a note had been indorsed by the creditor to a bank in whose possession it is at the time the lien is asserted, does not deprive the creditor of his right to assert a lien, especially when it appears that such note is afterwards returned to the creditor by the bank.
10. Where the description of the premises required in filing a mechanic's lien, is sufficient to advise purchasers and others of the lien and the land upon which it is claimed, it will be sufficient.
11. Where the debtor makes an assignment before a lien is filed, and the rights of the parties have by such act become largely fixed, it is probable that a less definite description will answer, than would otherwise be required.
12. When the contract is not in writing, it is not necessary under sec. 3185, Rev. Stat., to insert in the affidavit for a lien, a "statement of the amount and times of payment to be made thereunder."
13. Where the contract is not in writing the presumption is that payments are entire and the time, cash.
14. Where the builder came to a material man with a memoranda of materials, then needed, and desired prices on them, adding that he was going to build four or five greenhouses, and that he wanted the material man to furnish the lumber, which he did as he ordered it: *Held*, that the contract was entire.

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15. Where a note due four months from date is given to the material man, but the last item is not furnished until several months later: *Held*, that the time of payment is not extended beyond the time at which a lien may be filed.
16. Where the affidavit states that the materials were furnished "in and about the alteration and repair of a greenhouse building," when they were in fact used in the erection of five greenhouse buildings, all connected: *Held*, that the variance in the affidavit is not sufficient to affect the lien.

ROCKWELL, J.

A number of questions have been submitted to the court in the above matter, the first of which that will be considered is, whether Charles A. Reeser, the assignor, is entitled to \$500.00 in lieu of homestead exemption, out of the proceeds of the sale of real and personal property now in the hands of the assignee.

Charles A. Reeser, the assignor, files the following application which, as it contains a correct statement of the facts as appears from the evidence except that the assignor was a divorced man at the time of the assignment, is quoted in the entirety.

"And now comes the said assignor, Charles A. Reeser, and makes application for the payment to him of the sum of five hundred dollars, in lieu of a homestead, or set off allowed under the exemption laws of the state of Ohio, and says at the date of the assignment herein, he was a widower, living with an unmarried minor son: that in said assignment he reserved his right of exemptions under the laws of the state of Ohio, and that in the inventory and appraisement filed herein, in lieu of the set off to which he would be entitled, he reserved his right to make application for exemption, and that since said appraisement, he has become a married man, the head of a family, resident of the state of Ohio, and not the owner of a homestead, nor is his wife the owner of a homestead.

"He, therefore, asks that the court order the assignee herein to pay him the sum of five hundred dollars, out of the proceeds of the sale of the real estate, his homestead, sold under proceedings in this court, and if, by reason of liens, it is found that he is not entitled to homestead, that the same be paid to him out of the proceeds of the sale of other personal property.

"CHAS. A. REESER."

It will be proper to consider a number of sections of the Revised Statutes in deciding the questions raised by this application and the existing facts.

Section 5435 provides, "Husband and wife living together, a widow, or a widower living with an unmarried daughter or unmarried minor son, may hold exempt from sale, on judgment or order, a family homestead not exceeding one thousand dollars in value," etc.

Sec. 5440. "When a homestead is charged with liens, some of which, as against the head of the family, or the wife, preclude the allowance of a homestead to either of them, and others of such liens do not preclude such allowance, and a sale of such homestead is had, then, after the payment, out of the proceeds of such sale, of the liens so precluding such allowance, the balance, not exceeding five hundred dollars, shall be awarded to the head of the family, or the wife, as the case may be, in lieu of such homestead, upon his application, in person, or by agent or attorney."

Section 5441. "Husband and wife living together, a widower living with an unmarried daughter or minor son, every widow and every

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unmarried female having in good faith the care, maintenance and custody of any minor child or children of a deceased relative, residents of Ohio, and not the owner of a homestead, may in lieu thereof, hold exempt from levy and sale real or personal property to be selected by such person, his agent or attorney, at any time before sale, not exceeding five hundred dollars in value, in addition to the amount of chattel property otherwise by law exempted."

Great care has been exercised by the legislature to preserve all exemptions provided by law to an assignor.

Section 6348 provides, "No assignment for the benefit of creditors shall be construed to include or cover any property exempt from levy or sale on execution, or from being by any legal process applied to the payment of debts, unless in the assignment the exemption is expressly waived, or any property belonging to the wife of the assignor, nor to require the assignor to deliver up any of such property: and as to the homestead exemption, and exempt property that has to be selected by the debtor and his wife, the appraisers appointed by the court shall, on making the appraisement, set the same off in the same way that appraisers of property levied on or attached are required to do; and if, for any reason, this setting off is then omitted, the court may at any time thereafter, and before sale, order the same to be done by the appraisers."

And also in sec. 6351, after declaring that the court shall order the payment of all incumbrances, fix priorities and contingent dower interests it is provided: "But nothing in this section nor in section 6350 shall be so construed as in any way to impair the right of homestead exemptions, or to the right of an allowance in lieu of homestead or the mode provided by law for enforcing such rights."

I think there is but little doubt but that in the case at bar "the homestead is charged with liens" so as to "preclude the allowance of a homestead to either" C. A. Reeser, or his wife, and that after the payment of all liens thereon, there will be no balance from which a sum "not exceeding five hundred dollars" could "be awarded to the head of the family or the wife, as the case may be, in lieu of such homestead." Section 5440 has therefore but little application to the present case, except perhaps in an incidental way.

In applying the sections above quoted to the existing facts the following questions are presented:

1st. Was Reeser at the time he made the assignment a "widower living with an unmarried minor son?" or in other words, is a man divorced from his wife, a "widower" within the meaning of the word as used in the homestead exemption statutes? In the general acceptance of the word and as defined by all leading lexicographers, "widower" means a "man who has lost his wife by death."

Reeser was a man who had lost his wife, not by death, but judicial decree, and therefore, if a strict construction be given to the statute, it cannot be said that he comes within its terms.

But courts in considering these statutes providing for exemptions have invariably given to them a most liberal interpretation. In an early case it was said, "The humane policy of the homestead act (S. & C. St., 1145) seeks not the protection of the debtor; but its object is to protect his family from the inhumanity which would deprive its dependents members of a home, * * * and in aid of this wise and humane policy, the whole act should receive as liberal a construction as can be fairly given to it." *Sears v. Hanks*, 14 O. S., 298-300.

This language is quoted with approval in *Regan v. Zeeb*, 28 O. S., 483-485.

In that case it was held under a statute which provides that "any resident of Ohio, being the head of a family, might hold exempt from execution," that when man and wife were living together the wife might make the demand. And yet it can hardly be said in the general acceptance of the term, that when husband and wife are living together, that the wife is the head of the family.

Lexicographers, in the absence of their wives, would hardly have given this as a correct application of the phrase, "head of the family."

Here it was said (p. 484), "The argument is that the wife has no right to demand that this piece of property be exempted, because, by this statute, the right to make the selection is limited to the head of a family, his agent or attorney, and it is not extended to the wife * * * We do not concur in this view of the wife's right under this statute."

The same liberal construction has been followed in other states. An unmarried woman keeping house, and there bringing up two children of her deceased sister, *Arnold v. Waltz*, 58 Iowa, 706. A brother living with his widowed sister and her four small children, and providing for them, *Wade v. Jones*, 20 Mo., 75. And a bachelor who supports a widowed sister that keeps house for him. *E. D. Mo.*, 16 Nat'l Bank Reg., 328, have each been held to be the "head of a family" and entitled to a homestead exemption. The reason for holding that a wife living with her husband is the "head of her family" and entitled to demand and receive the homestead exemption, is no stronger than that which exists for holding that a divorced man living with an unmarried minor son is a "widower" and entitled to claim the exemptions provided by statute.

The one is not a more liberal construction of our homestead laws than the other. The same reasons exist for each. These laws were not made to benefit the debtor, but to furnish a home for his family amid the surroundings of which his children would receive that protection, care and education which would lead them to lives of usefulness, wherein they might be an honor to themselves and an ornament to society.

The more homes we have the better will be our people. The more children that are reared amid its influences, the better will be society, our country and its government.

And thus, while the benefit secured by the homestead laws may inure directly to the parent and his children, the ultimate result will be to the good of our general public welfare.

There is no difference between the responsibilities resting upon a divorced man living with an unmarried minor son, and therefore no reason exists why the legislature should provide for the one and exclude the other. The minor son is in need of as much care and attention in one case as in the other. Society is interested in one just as much as the other.

Neither does it require a very great straining of the English language to hold that a divorced man is a widower. True, it is not within the ordinary definition, but we find on examination that the word "widower" is derived from "widow," and that "widow" has a Sanskrit derivation, meaning without a husband, or lack of a husband.

And therefore in its broadest terms a "widower" might be defined to be, "A married man who has lost his wife" either by death or judicial

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decree. The separation in one case, from a legal point of view, is no more absolute than the other.

That a divorced man in the ordinary mind occupies a position in many respects analogous to a man who has lost his wife by death, is strengthened by the fact that modern society has adopted a word, including the word which defines a "man who has lost his wife by death," as descriptive of a divorced man.

The word "grass-widower" is not recognized as a standard word or even found in the older lexicons, but it springs forth full fledged in the Century dictionary, where it is defined to be "a man who for any reason is living apart from his wife."

There being several kinds of widowers, it would not be a violent presumption to presume that in the use of the general term, "widower," all were included; especially is this true where the same reasons exist for a like application to all.

I am therefore of the opinion, that a divorced man is a 'widower' within the true spirit and meaning of sec. 5435 and 5441, Rev. Stat., and is entitled to the exemptions therein provided for.

2. The second question for determination is, whether the right of the assignor to his exemption rests upon the facts existing at the time of the assignment, or upon those existing at the time the court orders a distribution. To properly answer these questions is a matter of no little difficulty, and may largely be controlled by the nature and condition of the property assigned, and the sections of the statute applicable thereto.

At the time of an assignment the assignor may be the owner of the following kinds or classes of property:

First—Personal property only.

Second—Real estate not occupied as a homestead.

Third—Real estate occupied as a homestead but not encumbered by lien so as to preclude the allowance of a homestead therein.

Fourth—Real estate charged with liens some of which preclude the allowance of the homestead while others do not.

Fifth—Real estate charged with liens all of which preclude the allowance of a homestead.

If the property assigned is of the kind mentioned in the first, second and third of the above classes, then the condition of facts existing at the time the assignment is made will control.

The deed of assignment conveys to the assignee rights at least equal to those acquired by an officer after having made a levy under sec. 5384. Each having the legal possession of the property, and for very much the same purpose, i. e. to convert it into money and apply it upon the debts of the owner.

In both cases the law preserves to the debtor the right to claim his homestead exemption, but it must be a right existing at the time of the levy or the assignment. It cannot be created afterwards. See *Stafford v. Smith*, 11 O. D. Re., 884.

The Supreme Court in *Selders v. Lane*, 40 O. S., 345, and the circuit court in *Nixon v. Vandyke*, 1 O. C. D., 364, have held that a judgment debtor cannot, after such levy and appraisal, either by occupation or marrying a wife and bringing her to reside thereon, acquire the right of a homestead.

In *Selders v. Lane*, the court say, "In this case, at the time of the levy, he was admittedly not entitled to the exemption; and his claim.

based on his subsequent marriage, is neither within the letter nor spirit of the statute." In *Wildermuth v. Koenig*, 41 O. S., 180, the court says, (p. 186) "We are not compelled to resort to a liberal construction of these words to see that the legislature intended that real estate having the character of a homestead, when it is about to be levied upon, should be set off for the use of the debtor's family. A literal construction gives this meaning to them." The court italicising the word "when."

If the property was of the kind designated in the fourth class under the ruling of the Supreme Court in *Cooper v. Cooper*, 24 O. S., 488, I am inclined to believe the facts *supra* (at p. 367) existing at the time the fund is finally disposed of would control. It would then be governed by the provisions of sec. 5440, "and the rule then seems to be," say the circuit court in *Nixon v. Vandyke* as decided in *Cooper v. Cooper*, 24 O. S., 488, that the question whether the judgment debtor is the head of a family, and therefore entitled to it, is to be determined, as of the time of the order of distribution of such fund."

The court in *Nixon v. Vandyke supra* clearly recognize that here is a distinction in the application of the exemption law as found in secs. 5435, 5438, 5441, and that provided in 5440.

In the case at bar the assignor at the time the assignment was made, was only the owner of property herein designated in Class 1, and 4 or 5.

According to the conclusions hereinbefore announced, the assignor not being in the condition of "husband and wife living together," at the time the assignment was made, should not, because he has since assumed that relation, be entitled to \$500.00 in lieu of a homestead out of Class 1.

But if the court should so decide, the questions made upon the alleged liens upon the real estate assigned, that if there should be a balance remaining in class 4 after the payment of the valid liens thereon, the assignor would be entitled to the same as being now the "head of a family." Of course he could not receive in any case more than \$500.00. As before herein stated, it is very doubtful if there will be any balance from this source; and there is practically but the one class of property from which the exemption can be paid. Class 1.

However, the assignor being a "widower" within the true spirit and meaning of the statute, "living with an unmarried minor son" at the time the assignment was made, which is the time that here controls, and not having ceased to so live, he is entitled to receive \$500.00 in lieu of a homestead out of the proceeds of the personalty in the hands of the assignee.

The fact that the assignor has re-married will not destroy his right to claim it under this head.

The same obligations rest upon him in reference to his son as did before, and the same reasons for the homestead allowance exist in full force. Not having abandoned his child, he has not forfeited his right.

We will next consider questions presented by mechanic's liens upon the lands assigned. And because the lien of Elder & Tuttle presents, perhaps, the most difficult questions, and for the further reason that the conclusions arrived at may largely decide many of the questions presented in the liens of others, this will be first considered.

On November 7, 1893, Mr. Reeser, the assignor, presented to Elder & Tuttle the following memorandum :

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**"CHARLES A. REESER,
Innisfallen Greenhouses,
SEEDS, PLANTS AND BULBS.**

Springfield, Ohio, Nov. 7, 1893.

**MESSRS. ELDER & TUTTLE,
CITY.**

GENTLEMEN :

I hereby hand you a list of pine and other fittings I need to use in a greenhouse I am erecting. Please give me your most favorable price, and also state how soon you can furnish the same after I place an order with you.

325 feet 4 inch black pipe.
1600 feet 11½ inch pipe.
1-4 inch straight way valve.
1-3 inch straight way valve.
1-4 by 4 by 3 inch Cross Reducing Malleable.
1-4 inch Flange-union.
1-4 inch Elbo Malleable, etc., etc.

Yours very truly,

CHARLES A. REESER."

A satisfactory reply was made and the articles therein designated supplied, and the price charged therefor entered upon a book account, the last article being furnished on December 2, 1893.

On December 8th, without any other or further conversation or contract, Reeser gave an order for twenty globe valves and other articles that were proper to be used in the construction of a greenhouse, and so he continued to order from time to time such articles as he needed in the construction of his greenhouse until March 12, 1894.

Whenever any articles were supplied in response to these orders, the customary price was charged, and entered upon the books of said Elder & Tuttle in the form of a running account. It might be added that this running account had some few charges in it that were for articles that were not proper or suitable to go into the erection of a greenhouse, but they were few and of little value.

On January 1, 1894, Elder & Tuttle sent Reeser a statement of the amount due, and Reeser not having the money, gave his notes for the full amount due in ninety days, and in addition forwarded them a check for the amount the bank would charge to discount the same.

This note being the \$458.00 one, was then placed in the First National Bank, for collection, but it seems was never indorsed by Elder & Tuttle.

On February 16, 1894, Reeser gave a second note for \$340.33, due in sixty days, under a like arrangement as the first. This note was placed in the First National Bank, and was indorsed: "Elder & Tuttle."

On April 4th, a mechanic's lien was filed in the recorder's office covering all the articles furnished Reeser from November 24, 1893, to March 12, 1894. This lien contained a correct description of these two notes. It appears, however, that at the time this lien was filed the \$340.33 note had not been returned to Elder & Tuttle, but was held by the First National Bank, under their indorsement.

This lien did not describe the premises by metes and bounds, but gave the following description: "Located on the lot or tract of land

owned as affiant is informed and believes, by Charles A. Reeser and described as follows: and known as the Innisfallen Greenhouses, situated in the county of Clark, state of Ohio, and in the city of Springfield, and at the southeast corner of Southern avenue and old Dayton road."

On June 7, 1894, for fear that this description might not be definite enough, and perhaps for other reasons not disclosed, a second lien was filed describing the premises by metes and bounds. At that time, too, the \$340.33 note had been returned to them. It may also be added that at the time Elder & Tuttle furnished Reeser with the articles for which a mechanic's lien is sought Reeser's credit was good, and so considered in the commercial world.

A number of objections have been raised as to the validity of this lien.

First. It is claimed that the contract between the parties is not sufficient to support the lien. That is, that when these articles were furnished Reeser, there was no stipulation that they were to be used in any particular building, or for any particular purpose, and that they were sold to him upon his own personal responsibility, and that there was no intention to make them a charge upon his realty. In order that these objections might constitute a valid defense to this lien, there would need to be such conduct on the part of Elder & Tuttle that a waiver of their right to a lien might be fairly inferred.

In other words, when a material man furnishes suitable material to a person who he knows is erecting a building, the law presumes that the materials are furnished for that building and so accepted by the purchaser, and likewise it will presume that the material man intends to retain the right the law gives him to collect payment for the materials by him furnished.

In *Iron Co. v. Murray*, 38 O. S., 327, the Supreme Court say: "While it is plain to our minds that the contract, which is made essential by this statute to the existence of a mechanic's lien, may be either expressed or implied, and, further, that it is not necessary that the contract should stipulate for such lien, or, even, that the labor or material should be furnished with an existing intention to perfect a lien on the property; nevertheless, we are satisfied that if such material or labor be furnished upon an understanding or agreement, either expressed or implied, that no such lien will be asserted, then the right to assert it is waived and cannot be enforced against a subsequent purchaser or lienor."

In the case at bar there was no understanding or agreement that the lien would not be asserted.

The first memorandum furnished by Reeser to Elder & Tuttle gave them knowledge of his building, and the articles thereafter ordered being suitable, they had a right to presume they were for such building operations, and not having agreed not to assert their right to a lien, they did not lose their right although they relied largely on his personal responsibility for payment of their claim. The contract in the present case is sufficient to support the lien.

The second claim that is urged against this lien or that will affect a portion of it, is, that all the material was not furnished under the contract: that each order constituted a separate and independent contract, and that therefore all the material that was furnished at a date more than four months prior to the filing of the affidavit could not be secured by this lien.

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"Under the mechanic's lien law, the account is an entirety, whether the work is done under a written contract and the contract is filed for the purpose of securing a mechanic's lien, or whether there is a running account of items furnished from time to time by the material man to the owner of the premises. From the time of the first item of the account it is treated as an entirety * * * and this lien is preserved from the beginning of the account, and the lienholder has four months from the last item to file his lien.

"Two distinct accounts furnished under distinct contracts cannot be tacked together to make a continuous account. The lien of each account must be within the four months required by statute." R. & W., Ohio Mechanic's Lien Law, 56.

The difficulty of making a correct application of the law in a case like the present, was fully recognized by the authors of the Ohio mechanic's lien law. (page 60.)

In giving the most liberal application to the mechanic's lien law, I have not been able to convince myself that all the material in the case at bar was furnished under one contract, or that the orders were so connected as to make the contract an entirety.

There was no obligation, either legal, moral or equitable, at any time for Elder & Tuttle to furnish, or Reeser to receive any other material than that specified in each order as it was given.

The case of Central Trust Co. v. Texas & St. L. R. R. Co., 23 Fed. Rep., 673, is important as showing the construction given by Justice Brewer upon a somewhat similar question.

This was a case where a receiver was appointed for a railroad, and was an application of the mechanic's lien law of Kansas.

The court discusses, what is an "open" or "running" account, and what will constitute a "subsisting" contract, quoting an order made by U. S. District Judge Treat, in reference to such matters. In reference to the particular order discussed by counsel, my brother Treat has prepared an exposition which may help to a right understanding in future proceedings in this and other cases, which I will read:

"The various rulings of the court with respect to betterments and wages, not within the respective time stated,—to-wit, six months or otherwise—have rested upon this distinctive proposition: That supplies furnished or services performed under a subsisting contract to which and to the continuance of which the parties were respectively bound, and the termination of said contract did not happen, except within the time limited; or when such a continuing contract was still in force at the appointment of a receiver, the items of such continuing and subsisting contracts would fall within the prescribed rules.

"No other demands, independent of their nature, incurred before the prescribed time, are to be treated other than as credits at large. If this ruling is enforced there need be no difficulty with respect to what are called 'open and current accounts. Such accounts must be under subsisting contracts, not to be terminated until within the period of time named; otherwise all items previous to that time must be rejected. This ruling may be subject to an exception where the local statute gives a lien under a different limitation. In the latter cases difficulties may arise if local decisions are followed, each one of which must depend on its special facts.'

"That is, in order that there shall be a subsisting contract, it must be one binding on the vendor as well as upon the railroad. A mere

open, running account does not necessarily come within the purview of that. In dealing with a grocery merchant, for instance, you order separately from day to day, and while, by implied understanding or agreement, there may be an open, running account, yet it is an account terminable at the option of either party at any time. The purchaser may say he will make no further purchases. The merchant may decline to make further sales. It is not, therefore, a subsisting contract. There must be a contract by which the vendor is under obligation to furnish for a definite time; as for instance, if the vendor had contracted to furnish for a period of six months, so much lumber each month at a certain rate, there is a contract which during the six months is binding upon him as well as binding upon the road. It is a subsisting contract enforceable as against both parties. But where there is simply an open, running account, terminable at the instance of either party at any time, it is not within the scope of the order. We think the master fairly interpreted it, and we sustain his construction."

Counsel for Elder & Tuttle has cited *Jones v. Swan*, 21 Iowa, 181, as sustaining his position that their lien covers all the material by them furnished. As this case was decided while that eminent jurist, John F. Dillon, was a member of the court, and as the law applicable to mechanic's liens is aptly stated I will quote at some length from the opinion.

"From the testimony the court was justified in finding the following facts: Plaintiff is a founder and mechanic. The articles were furnished as charged, commencing on the second of December, 1893, and closing May 23, 1895, the account running continuously through the entire time. The work was done and materials furnished in repairing old and in making new machinery, from time to time, as the owners of the property required, in pursuance of a verbal contract, made about the time the first articles were furnished, under which plaintiff was to make and furnish castings as they were ordered with the knowledge and understanding that they were to be used in this factory, and where they were in fact used. At this time all the items of the bill were not contemplated, but as additions and changes would be made, other orders would be given, plaintiff acting under the same contract, and defendants doing nothing to lead to any other supposition. The items were charged in plaintiff's books, as he charged other persons, Swan, the active partner, frequently calling and ordering the work.

"Upon these facts the court very properly recognized and established plaintiff's lien.

"He is a 'mechanic' or 'artisan.' As such he 'performed labor' and 'furnished material' in and about the construction and repair of certain 'machinery or fixtures' in defendant's factory. This was a part of the erection or improvement upon the land. And this was all done under a contract with the owner or proprietor of the factory or building, including the land upon which the same was situated.

"To entitle the mechanic or builder to a lien, it is not necessary that every article should be contemplated and specifically named at the time of making the contract. They must, we admit, be furnished under a contract with the owner or proprietor. But if thus furnished, it makes no difference that the items were charged, from time to time, in the builder's or mechanic's books, in the same manner that he charged his other customers generally. Nor is it necessary that it should be

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expressly understood that the artisan is to have a lien for his work and materials.

"Such a contract is not made in one case in fifty. Nor does the law contemplate it, in order to make the lien effectual. Such lien attaches, and shall be preferred to all other liens or incumbrances, which become subsequent to the commencement of the building, erection, or improvement.

"When the work is done and material furnished under a contract, the notice is not to be given within ninety days from the doing or furnishing each item, but within ninety days after all shall be furnished or done. The contract is treated as entire, all the items being furnished thereunder. Where there is a continuous, open current account, the cause of action, under the statute of limitations, shall be deemed to have accrued as to all on the date of the last item. And so the mechanic's lien attaches at the commencement of his work, and the ninety days for notice commence on the date when all the work or things are furnished or performed. And in all is included the first as well as the last item. Of course, where the work is done under different contracts, or such space intervenes between the different items as to raise the presumption that the work had once ceased and the contract was completed, a different rule would obtain. But the contract once shown, if the work is done, as in this instance, almost daily, the lien continues, as to the owner and subsequent incumbrances, for ninety days from the date of the last item.

"Any other rule would render the lien of the mechanic next to, if not quite, a sham and delusion."

But it will be noticed in this case that materials were furnished in pursuance of a certain contract made about the time the first articles were furnished, under which the castings were to be supplied as they were ordered, and differs therefore materially from the case at bar.

There is no contract, nor is there any evidence from which it might be inferred that when Reeser made one order, he would ever make another; Reeser never said to Elder & Tuttle that he wanted them to furnish certain material for his greenhouse other than as mentioned in his first order.

Thereafter Elder & Tuttle inferred, from the fact that they knew he was building a greenhouse, that the material was for that purpose as each order was supplied, but they had no knowledge how much more might be needed, or that they were to furnish it.

Each order was separate and independent. If Reeser would have said to Elder & Tuttle that he was going to build a greenhouse and wanted them to furnish such articles as he would need, or as he might order from time to time, or if there was anything from which an understanding might be inferred that an order would be followed by another until the work was done or the building completed, other than the mere fact that orders did follow each other; it might be held that the contract was of sufficient entirety to bring all such orders within a mechanic's lien, and that the last item might save the first.

There must be something more than mere knowledge that a building is being built and the supplying of orders for suitable material, in order to constitute a "continuing," "subsisting," or "entire" contract within the meaning of the lien law.

The materials in the case at bar were not furnished under such circumstances that it can be held that they were furnished in pursuance of a contract, either continuing, subsisting or entire, and all items or orders

for material furnished more than four months prior to the filing of the affidavit will be stricken out, as not being filed within the time required by law. Also all unsuitable materials or articles, such as are not ordinarily used in a greenhouse, and were not in fact used in the construction of a greenhouse, should be stricken out.

It is also urged that Elder & Tuttle waived their right to a lien by taking notes for the material furnished, etc.

The evidence is not very clear whether the notes were given and accepted in payment of the amount due. There is no evidence that the account was balanced. Reeser was given a credit by bills receivable. It is well settled law in Ohio that if the note was given and accepted in payment, that there could be no lien. *Crooks v. Finney*, 39 O. S., 57. The case of *Victoria B. & L. Am. v. Kelsey* 9 Ohio Dec. Re., 123, decided by the old district court of Hamilton county, is almost identical in its statement of facts, especially as to the taking and indorsement of the notes. Smith J. in the opinion says: (p. 124.)

"Another question raised, was that inasmuch as the note was given before the mechanic's lien was taken out, it discharged the lien; but we think it can only suspend the lien, and if before the end of four months from the time the work was completed, the note was taken up, there was nothing to prevent Mr. Morgan from taking out his lien. This question was presented in the cases of *Steamboat Charlotte v. Hammond*, 9 Mo., 59, and it was held that a note given and payable at a future day but within the duration of the lien, will not merge the original debt nor extinguish the lien.

Both of the notes given in this case matured within the time required to secure the lien, and both were unpaid before the time expired for taking a lien—and then the lien was taken. Morgan was the owner of the claim—though he had indorsed the note, he was still liable as indorser.

"In *Steamboat Charlotte v. Kingsland*, 9 Mo., 67, it was claimed that the indorsement of the note operated as a discharge, but the court say: 'The receiving a negotiable note in payment of an account and its transfer by an indorsement in blank, and delivery to one who received it on the faith of a lien, do not extinguish the legal right to enforce the lien by the payee in a suit to the use of the holder.'

"The case of *Smith v. Ward*, 4 Ia., 112, is cited as tending to support a contrary rule, but in that case it was expressly held, that the lien was not waived by the acceptance of the note; but it was intimated in the opinion that if the holder had parted with the entire possession and ownership, the lien would be lost. Mr. Morgan in this case, had not assigned that note absolutely, but was liable as indorser, and *Smith v. Ward*, *supra*, refers to another decision by the same court in the same volume. *Hawley v. Warde*, 4 Ia., 36, which holds that where the payee of a note was entitled to a mechanic's lien, he does not waive or forfeit his lien by indorsing the note and leaving it for a time with a third party as collateral."

Bernsdorf v. Hardway, 6 Ohio Circ. Dec., 171, is the most recent Ohio decision on this subject. The opinion was rendered by Caldwell, J., of the Cuyahoga circuit, and presents phrases of similarity to the case at bar. In the opinion it is said: (p. 171.)

"The furnishing of the slate was done in the latter part of September, 1890. In the latter part of January, 1891, Mr. Hardway gave a note, and exactly for what the note was given there is some controversy, it

being claimed on the one side that it was for the precise amount of the two liens claimed, and Hardway saying it was for a general balance of account. But we think the testimony fairly supports the proposition that the note was given for these items in controversy in this case. The note was not paid. It was drawn payable with interest. In March, 1891, Auld & Conger, having once completely slated the house, went back and replaced the slate which had been broken or injured by the painters or other workmen who in the meantime had used the roof, and by means of which use it was injured.

"It was claimed in the outset that the question of the waiving of the lien by the giving of the promissory note, was settled by the decision of the Supreme Court of our state. There was some testimony in which it was said that the note was spoken of as being taken in payment of that lien, but that was a witness who had no personal knowledge on the subject.

"The testimony substantially was that there was no express agreement, nor were the circumstances such as to imply an agreement that this note should be considered to be in payment of the account, so that under the decisions in this state, that the mere giving of a promissory note for an account is not a payment of the account, we should have come to the conclusion on the evidence that, so far as that was concerned, this note was not a payment of the account for the materials furnished and labor performed.

"We are referred to *Crooks v. Finney*, 39 O. S., 57, in which it is held: 'Where a promissory note is given and received in payment of a mechanic's claim for materials furnished and work done in erecting a house under a contract with the owner, the lien of the mechanic is waived.'

"In this case the court was compelled to come to the conclusion that the note was received in payment of the account. * * * The general rule is regard to whether the circumstances under which a note will be taken and considered to be in payment of the claim, has been several times laid down by the Supreme Court of our state. The case of *Merrick v. Boury*, 4 O. S., 61, is a leading case.

"One of the syllabi reads: 'It is only by force of an agreement of the parties, that the giving of an unsealed note by the debtor will be payment of a precedent debt. The burden of proof is upon the debtor, who must establish the agreement clearly; and the question whether there was such an agreement, is one of fact to be determined by the jury.'

"There was some slight discussion whether, even if it was in payment, it was not a waiver of the lien; but that matter, if there could have been any question about it, seems to be settled by the present provision of our statute. Sec. 3187.

"It was suggested that this statute was not then in force. As a matter of fact this statute was passed on March 5, 1887, 84 O. L., 46, 47. The decision in *Crooks v. Finney*, *supra*, was made in 1883. It looks as if the legislature, in passing this statute, had in mind this decision of the Supreme Court. But this lien was obtained in 1889 and 1890, and was after this act was passed. We are therefore of the opinion that the giving of the note was very clearly not a waiver of that lien."

The court in this case seems to be in some doubt, whether if the note had been taken in payment, under the present statute, the lien thereby would have been lost.

It is claimed, however, that because at the time this lien was filed the second note for \$340.33 was in the possession of the First National Bank, indorsed to them by Elder & Tuttle, that no lien could be acquired as to that amount.

It is not very clear from the evidence just how this note was held by the bank. It was not indorsed "without recourse." Elder & Tuttle were liable as indorsers; and while they did not have possession of it at the time the lien was filed, they certainly recognized their liability thereon, by giving a full and accurate description of it in their affidavit. Before the note was dishonored and long before this action they lifted it.

I have been informed that the late Judge Goode, of our common pleas, held in an action there pending that it was sufficient to retain the right to the lien, if at the time of the suit the material man held the ownership of the note, and that it was not absolutely essential that he held it at the time the lien was filed, provided he still retained an interest in it by way of a liability as indorser, etc., therefor.

The case of *German Bank v. Schloth*, 59 Iowa, 316, 13 N. W. Rep., 314, stated the law well on this subject when it says:

"The case under consideration is this: The lien holder transfers the note, which is a negotiable instrument, and when it is dishonored by non-payment of the indorsee, lifts it by payment to the indorsee. Can the lien holder, the payee of the note, after he has received the note from the indorsee enforce the lien? We think he can, for these reasons: He was at no time without interest in the note. He was responsible while it was in the hands of the indorsee as an indorser, and that responsibility was accompanied by the liability of the maker to him.

"The contract of the indorser and maker run together. The indorsee agrees to pay if the maker does not, and the maker is bound to the indorser if he fails to pay the indorsee.

"These are subsisting contracts while the paper is in the hands of indorsee. Like all other contracts they are only enforceable by action upon default by the parties bound.

"The maker all the time the note is in the hands of the indorsee is bound by his contract to the payee. We conclude therefore, that the payee does not cease to become a party to the contract so as to waive any liens which accompany the note. This position is strengthened by the consideration that upon default of the maker, the indorsee acquires the note under no new contract.

"When he lifts it, it becomes again fully and exclusively his property, and he is authorized to strike out his indorsement. It appears that the indorsee's interest in the note is not of such exclusive character as to deprive the indorser of all interest and title therein. The title of the indorsee is so qualified as to permit the indorser to hold an interest in the note and a conditional title which becomes absolute upon payment made by him after dishonor of the paper.

"Now surely no reason exists for a rule which defeats the lien accompanying the note when it is re-acquired by the indorser."

Of course, if at the trial Elder & Tuttle had not re-acquired this note, and they had parted with all right, title and interest in it, in any way whatever, they could not include it in their lien.

I do not believe that in the case at bar the facts will warrant a holding that the notes were received in payment, or that the right of the lien was lost by negotiation of the \$340.33 note.

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See R. & W.'s Ohio Mechanics L. Law, pps. 34-35 and 69-70.

It is also argued the description of the premises in this lien is defective, in that it is vague, indefinite and uncertain.

"The best rule," says Phillip on Mechanic's Lien Law, quoted by R. & W. Ohio Mechanic's Lien Laws, p. 72, "to be adopted is, that if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty to the exclusion of others, it will be sufficient.

"There is great reluctance to set aside a mechanic's claim merely for loose description, as the statute generally contemplates that the claimants prepare their own papers and it is not necessary that the description be either full or precise."

Applying the rule here laid down, the description appears to be sufficient. The Innisfallen Greenhouses constituted a well known plant. They are situated at the southeast corner of Southern avenue and the old Dayton road, in the city of Springfield, Clark county, Ohio, and comprise a dwellinghouse, stables, greenhouses and other out buildings. Although the ground was purchased in several tracts, it is not laid out into lots in an accepted plat, and was all used in the conduct of the business of a floriculturist.

The lines of demarkation were not observable. Without an examination in the recorder's office, no one would know that there was more than one tract, and then he might need the surveyor to point out the boundaries.

The description is hardly such as I would commend, but it is sufficient to advise purchasers and others of the lien and the land upon which it was claimed.

Reeser having made an assignment before the lien was filed, and the rights of all the parties having become in a large degree fixed by that act, it is probable that a less definite description will answer in this case than would otherwise be required.

The next objection that is made is that the affidavit does not state the contract or the amounts and the times of payment to be made thereunder.

The affidavit sets forth a detailed statement of the materials furnished, with the amounts charged for each item, and the time when it was furnished.

And that the same "were furnished under and by virtue of a contract not in writing between the said Elder & Tuttle and the said Chas. A. Reeser."

There is some question under sec. 3185, as it now stands, where the contract is not in writing, whether it is absolutely necessary to make a statement of "the amounts and times of payment to be made thereunder."

Section 3185, after enumerating other matters that the affidavit must contain, continues: "A copy of the contract of it is in writing, a statement of the amount and times of payment thereunder. * * *"

The first statute in which anything is said upon this particular matter is found in 74 O. L., 169, and the language there is "a copy of the contract if it be in writing, a statement of the amount and times of payment to be made thereunder."

Thus it will be seen that when the act was amended, in its present form, the clause "and if it be not in writing" was stricken out. And the

statute now contains no positive injunction that even the substance of a verbal contract be given in the affidavit.

This omission by the legislature may be the result of an accident, but I must presume that it was done with a purpose, and the only purpose that I can conceive, is, that where the contract is not in writing, that no "statement of the amount and times of payment to be made thereunder," is required in the affidavit for a lien.

This may have been stricken out for the reason that often in a verbal contract these matters are not of such definiteness that they can be shown to a certainty, and also generally they are of such small amounts that they are not divided into payments to be made from time to time, but there is usually but one payment, due at the time the work is done or material furnished.

And the legislature probably had in mind job contracts, or such as are for large amounts, and are usually made in several payments, at different times to correspond to the progress of the work.

Where the contract is not in writing the presumption is that payments are entire and the time, cash.

In the case at bar, the itemized statement shows that the articles were supplied at different times and a charge made for each, and as the object of requiring a statement of the amount and time of payment is "to inform other lien holders, incumbrancers or purchasers as to the justice of the claimant's lien and its nature and character" (R. & W. Ohio Mechanic's Lien Law, 70), the information intended by the statute is probably supplied. Furthermore it should be remembered that the assignment was made before the lien was filed, and many of the rights of the parties become fixed by that act.

I doubt very much where the affidavit states, what is supported by the evidence, that the contract is not in writing, that "a statement of the amount and time of payment to be made thereunder," is in any case required; at least in the present case I am willing to hold that it is not required.

This concludes, I believe, the question made on the Elder & Tuttle lien.

In reference to the lien of Woliston, Wilder & Co., I think that the evidence is sufficient to constitute the contract, a continuing one of sufficient entirety, that the lien will include the first item, in the account. The testimony adduced shows that Reeser came to Woliston, Wilder & Co. with a memoranda of materials that he then needed, and said he desired prices on them, adding that he was going to build four or five greenhouses, and that he wanted them to furnish the lumber, which they did as he ordered it. This makes the case very similar to Jones v. Swan, 21 Iowa, 181, largely quoted from herein, in the consideration of the Elder & Tuttle lien.

The evidence in reference to the receipt of Reeser's note by Woliston, Wilder & Co. in payment is less strong than that in the Elder & Tuttle matter, and under what was said there it will be held that the lien was not lost for that reason.

In this case the note was given payable four months after its date, and this it is claimed extended the time beyond the period at which a lien could be filed.

If this note had been given in full payment at the time the last item in the account was furnished, there might be something in the claim,

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but it was not given at the close of their account, for it is dated December 1, 1893, and the last item is of the date of March 2, 1894.

The note was due April 12, 1894, the lien could have been filed any time up to July 2, 1894, almost three months after the note was due. So it is easily seen there is nothing in this claim.

It is also said that the affidavit states that the materials were furnished "in and about the alteration and repair of a greenhouse building," while the evidence shows that they were furnished in the erection of five greenhouse buildings, all connected, and that this will make the lien defective. It occurs to me that this is not a sufficient variance to affect the lien. It is sometimes quite difficult to distinguish between what is an alteration and an erection.

It doesn't matter, as I can see, to any one whether it was an erection or an alteration, both being included in the statute, providing the materials were furnished for the purposed improvement, and were in fact used in the building, etc., as is admitted in this case.

No objection was made as to the lien of F. Desormoux & Son, and the evidence supporting the same, it will be allowed.

I believe this disposes of the questions made in this cause, and counsel will prepare an entry in accordance with the findings upon the various matters.

Oscar T. Martin, for assignor.

A. H. Kunkle, for assignee.

Keifer & Keifer, for Elder & Tuttle.

Hagan & Hagan, for F. Desormoux & Son.

D. Z. Gardner, for Woliston, Wilder & Co.

F. R. Geiger, John C. Barrett, V. G. Smith, for general creditors.

RECEIVERS—ESTOPPEL.

[Hamilton Common Pleas.]

EQUITABLE NATIONAL BANK V. GUCKENBERGER, RECR.

1. Judicial tribunals are constituted for the exercise of judicial functions upon legitimate contentions and controversies submitted by parties, and are not constituted for the purpose of operating commercial enterprises for the mere accommodation of those who lack capacity to manage their own affairs.
2. The appointment of a receiver to conduct the affairs of a corporation, is justifiable only as a provisional remedy, ancillary to the securing of some other main and ultimate relief which is sought in the action.
3. Where the petition does not ask for the dissolution of the corporation, or show that it is insolvent, but only alleges that the directors refuse to devise ways and means to meet the indebtedness of the corporation: Held, that no grounds for the appointment of a receiver are shown.
4. The term "estoppel" is no synonym for "assent." To work an estoppel it must appear that the one urging it will be injured by allowing the party against whom the estoppel is urged to deny any possible construction to be put upon his prior act or conduct.
5. The fact that the receiver has reserved a sum sufficient to pay the bank in full, in case the litigation in which the bank seeks to overthrow the receivership, should be decided in favor of the bank, shows that the receiver was not misled by the bank's acceptance of dividends, into believing that it had recognized or conceded the validity of his appointment.

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6. Where a receiver was appointed, and a bank accepted dividends paid by a receiver under an express agreement that its right should not be prejudiced by such acceptance, such acceptance should not estop the bank from assailing the validity of the receiver's appointment.
7. Nor should such estoppel result from a failure on the part of the bank to make specific objections to entries made, authorizing the continuance of the business by the receiver, and for the sale of the property by him, where the bank only became a party to the action five months after the suit was instituted, and where there is nothing on the records to show actual knowledge of these entries on the part of the bank.
8. No entry of directions to a receiver can rise to be greater and more comprehensive than the receivership itself; no such entry could but be a thing subservient to the main project and a part of it; therefore, objecting and protesting against the receiver and his appointment carries along an objection and protest to any entries in reference to such receiver.

WRIGHT, J. (dissenting).

There was in my judgment but a single ground set out in the original petition, which by peradventure at all warranted the appointment of a receiver—this was an allegation that the "Directors have declined to to call any meeting of their board since April 12, 1895, and have refused to meet for the purpose of devising ways and means of paying the company's maturing obligations, and have refused to meet and have failed to devise ways and means for the payment of the indebtedness of said company." If it be said that these averments warranted the appointment of a receiver upon the petition, yet such an appointment was only justifiable for a mere temporary purpose, that is to say, only until a new board of directors had been elected; yet the appointment was not made upon this ground, and has not been undertaken to be justified upon this ground; and further, upon the motion to discharge the receiver, these allegations were positively and emphatically disproven.

Apart from them, my judgment is that the petition not only failed to set forth facts which justified the receiver, but affirmatively set forth sufficient matter of fact to demonstrate that the whole case made, was one wherein a receiver was improper; it was not an action to dissolve the corporation, neither was corporation insolvent; the petition averred among other things, "that the premises, buildings, machinery and apparatus together with the good will of said business, are fairly worth the sum of \$125,000, and that said company now has on hand twines and cordage manufactured and ready for sale of the value of \$30,000, and unmanufactured stock on hand amounting to \$70,000, and also a large amount of out-standing accounts; that the business of said company is of great value, and in ordinarily good times is capable of earning large profits; that the liabilities of said company in open accounts amount to about \$15,000, and other indebtedness in the form of bills payable, amount to about \$10,000; that all the indebtedness of said company does not nearly equal the amount of the assets conservatively estimated; that, notwithstanding the facts above stated, said company is embarrassed and unable for want of funds to meet the liabilities now due and such as will mature in the near future." The prayer of the petition is as follows: "Plaintiff therefore prays that the court order such steps to be taken as may be necessary to ascertain the total indebtedness of said company, and to cause the same to be paid from its business and assets in the manner most speedy and equitable, and that in the meantime a receiver be appointed to take possession of all the property and assets of said company with directions to continue the operation of said busi-

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ness until further order of court, and for such other and further relief as may be proper in the premises." In short, the petition in its ensemble showed that the project was to divest the duly elected officers of a solvent corporation of the conduct of its affairs, and that no ultimate relief was sought or contemplated, saving the mere appointing of a receiver, and the disposing of the affairs of the corporation into his hands. The answer of the directors shows no more than that they were quite ready to be relieved of the onerous oppressiveness of paying attention to their own affairs, and glad to abandon the performance of their trust duties in case the court should feel a willingness to assume their functions.

It has always seemed to me that judicial tribunals are constituted for the exercise of judicial functions upon legitimate contentions and controversies submitted by parties, and not for the purpose of operating commercial enterprises for the mere accommodation of those who lack capacity to manage their own affairs. And I am bound to say, that it seems to me that the appointment of a receiver to conduct the affairs of a corporation is justifiable only as a provisional remedy, ancillary to the securing of some other main and ultimate relief which is sought in the action. The one seeming (but perhaps unreal) exception to this rule, I have thought is to be found in the appointment of receivers for common carriers, which is justifiable upon grounds not at all attendant on cases of mere private enterprises. The paramount obligations of common carriers, are to the public, and the public has such a very great interest and concern in seeing them preserved intact—and in requiring an uninterrupted continuance of their operation, that is fairly against public policy, and in public detriment to suffer their disintegration to be effected by temporary embarrassment when the ills attendant upon that result can be averted from the public by taking their affairs for a time into the hands of an officer of court. But I can see no more jurisdiction given to courts to constitute themselves as general managers of the affairs of private corporations whenever they happen to be invited to such a situation, than I can see jurisdiction given to courts to engage themselves as members of partnerships formed for commercial enterprises. If I have entertained a grave doubt about the sufficiency of the petition upon its face to justify the appointment of a receiver, yet I entertain no manner of doubt at all, but that the receiver ought to have been discharged upon the hearing; as has been said, the petition showed the corporation solvent; and the hearing developed not that the directors were refusing to attend to the affairs of the corporation, but that they were attending to them in such a way as would probably require the petitioner to devise means for the payment of some \$30,000, which the Jacobs' estate, which plaintiff represented, owed the corporation; the hearing further developed that the application had been made by her, for the reason that she, being a majority stockholder, was unable to force upon the board of directors her choice of the policy to be pursued, and further, that the board of her choice had failed to be returned at a stockholders' election held a few moments prior to the filing of her petition.

Upon the point of the estoppel I am unable to agree; it is by my learned brethren put upon these several grounds:

First—Acceptance of dividends.

Second—That entries authorizing the continuance of the business and for the sale by the receiver of the property were suffered to be made without an especial and specific objection from the bank.

Third—Because in its supplemental answer and cross-petition the plaintiff in error alleged that the receiver had converted the assets of the corporation into cash, and because it therein prayed the court to order payment of its claim out of the proceeds.

Upon the first point, I must say that it was at the hearing before us argued by counsel that whatever dividends were accepted by the bank, were accepted under an express agreement that its rights should not be suffered to be prejudiced thereby; and even if it be said that the receiver was without authority to bind creditors by such an agreement, yet it seems to me that it objection to such an agreement is to be heard, the objection ought to come from creditors not from the receiver. As far as I have been able to hear at all, neither creditors nor receiver have presented the point. Nevertheless, it seems to me bad precedent to say that a party shall be lured to the acceptance of a portion of his due through an agreement held out by the court's officer that his rights shall be saved; and that thereupon the court itself shall turn upon the party and cut him out of his right for that he presumed to an abiding faith and confidence that its representative would keep faith. It rather seems to me that the high plane of morality and fair dealing, whereon courts are supposed to exercise their functions, demands that no officer of court shall be permitted by questionable practices to cajole parties out of their rights. If any one is to lose, let it be the officer of court; if the receiver had no right to make the agreement let him off-set his blunder by enduring its consequences.

Upon the second point, I can see no estoppel in that these certain entries came to be made without specific objection from plaintiff in error. An entry authorizing the receiver to continue the business was made upon the very day of his appointment, June 7, 1895. Plaintiff in error became a party and filed its petition upon November 2d, of the same year. I have not discovered how in the nature of things it could have made specific objection against the entering of an order which had been made and was in operation for full five months before it ever was a party. The full and only purpose of its petition was to assail the validity of the entire receivership, and to vacate this appointment; it was objecting to and endeavoring to contend against the receivership itself, in its entirety: no entry of directions to the receiver could rise to be greater and more comprehensive than the receivership itself; no such entry could but be a thing subservient to the main project and a part of it; objecting and protesting against the whole, I believe, carried along an objection and a protest against all that amounted to no more than a mere part. And, at best, it is merely by the application of nice technicality that it is able to be said that the plaintiff in error had notice of the entries at the time they were made; for no reason save that it happened to be a party to the suit; there is nothing in the record which at all tends to show actual knowledge of these entries; and even had there been actual knowledge of the entries, an objection to them would have gone directly in the face of the prayer of the bank's supplemental petition, which prayed that its claim might be paid out of the proceeds of the sale.

Generally, upon the question of estoppel, it seems to me that the term "estoppel" is no synonym for mere "assent;" I have thought it necessary to the operation of an estoppel, first, that some one should urge it, and, second, that he who did urge, must cause it to appear how in some wise or other he would be made to undergo a mischief in case the party

to be estopped was suffered to deny a construction possible to be put upon his prior act or conduct; the receiver cannot be said to have been misled to a belief that the bank by accepting dividends, or by failing to make of itself a stumbling block in the way of his every footstep, had recognized or conceded the validity of his appointment; that he did not so believe is doubtless shown in that he has all the time retained and now has in his possession a sum expressly reserved to meet the claim of the bank in full, in case the litigation should at the end go in its favor. Had the conduct of the bank been such as to mislead him into divesting and stripping himself of all trust funds, then time enough to cry estoppel; this is not that case; the Record of July 20, 1897, displays an entry in words as follows:

"Upon application of Charles Guckenberger, receiver, and it appearing to the court that he has on hand money enough, after retaining sufficient to satisfy the claims of the Equitable National Bank, now in litigation in this court, to pay a fourth dividend to creditors of eight per cent.

"It is ordered that said receiver be, and he is hereby directed to pay to the creditors of the defendant corporation, a fourth dividend of eight per cent."

I must say, that in my opinion the receiver should have been discharged upon the hearing, and that the order denying the application for his discharge ought to be reversed.

CLERK OF COURTS.

[Hamilton Common Pleas.]

STATE OF OHIO V. GEORGE HOBSON ET AL.

1. The duty imposed upon the clerk of the courts by sec. 1325, Rev. Stat., as to receiving "all moneys payable into his office," is in addition to the other statutory duties, providing for the receipt of money, devolving upon him.
2. Under the statute the clerk must perform the duties of a clerk at common law; such a clerk was to perform any and all duties which the court might impose, or which, in the administration of the common law he should do, or the court might order done in the exercise of its judicial functions. He would, therefore, be the legal custodian of money ordered paid into court, by the court, or paid in on judgment.
3. The bondsmen of the clerk are liable for money received by him as clerk of the superior and circuit courts, although the bond refers solely to the clerk of the court of common pleas; since the term "clerk of the common pleas courts," is merely his title, and he is under the statute clerk of the superior and circuit courts.
4. The bondsmen are entitled to set-off against their liability the amount of the salaries due the deputies of the clerk, though such salaries were irregularly paid by the clerk, and also the unpaid salary of such clerk, he not yet being convicted of misconduct in office, so as to forfeit his salary.
5. Where the court deposits funds with a bank as clerk of the courts, the bank has no authority to pay out such funds on the individual check of such clerk, even though there was printed on such checks the words "county clerk," and if the bank paid such checks, it, and not the bondsmen of the clerk, is liable to the county for the amount so paid.
6. The bondsmen of the clerk are liable for all moneys received by the clerk from his predecessor, since under sec. 1340, Rev. Stat., it is the duty of a clerk to pay over to his successor all moneys received by him as clerk, whether the receipt of such money by him was proper or not.

SMITH, J.

This is an action brought on behalf of the state of Ohio against George Hobson, George R. Griffiths, George Campbell, Simon Krug, Robert H. West and Jacob A. Haerr, as sureties upon the bond of George Hobson, as clerk of the courts of Hamilton county, Ohio, to recover under said bond the sum of \$70,263 38, by reason of said George Hobson failing and refusing to pay said sum into the treasury of Hamilton county, or to any person or persons entitled to receive the same or any part thereof, except the sum of \$30,763.91, which was paid to Mr. E. R. Monfort, the successor of the said Hobson in office. It is alleged that the said Hobson has converted said sum to his own use, and has failed and refused and still fails and refuses to pay any part thereof into the treasury of Hamilton county, or to any person or persons entitled to receive the same, and this action is brought against him and his bondsmen to recover from him and on his said bond the amount of his said shortage, as alleged.

The allegations of the petition, alleging the election and holding the office by George Hobson, as clerk, his resignation, and the appointment and qualification of his successor, the bond with all the endorsements thereon, the same being approved by the prosecuting attorney and commissioners, are all admitted in the answers of the defendants.

The claim consists of two parts, that which relates to moneys in the clerk's office, which should have been in the possession of George Hobson at the time of his resignation, and that which relates to false and fraudulent vouchers which were issued by him, amounting to \$2,145.45 and against which amount no defense is made.

In review of the evidence, the testimony shows that on the day when Mr. Hobson resigned and went out of office, the books of the clerk showed the following balances :

Clerks' fees.....	\$ 9,803 75
Sheriff's fees	2,813 43
Witness' fees.....	3,794 21
Stenographers' fees	6,762 13
Stenographer's fees.....	5,276 02
Criminal stenographer's fees	1,821 00
Interpreter's fees.....	24 00
Coroner's fees.....	47 10
Transportation.....	828 20
Criminal costs.....	12,452 34
Printers.....	135 50
Old sundries.....	887 50
Civil deposits.....	1,140 33
Sundry deposits.....	6,743 07
Advance divorce costs.....	2,980 00
Total.....	\$55,308 58

The books also show that Mr. Hobson paid \$3,000.00 on account of criminal costs into the county treasury on Jan. 2, 1897, and \$11,954.80 into the county treasury on account of clerks' fees on Jan. 30, 1897, and in settlement of the quarterly report for the quarter ending Jan. 30, 1897. The evidence, however, shows that neither of these amounts were deposited as shown by the books, and therefore it is claimed by

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counsel for plaintiff, that they should be charged to Hobson, making a total of \$70,263.38, which is the full amount set out in the petition. Against this amount there is a credit of \$30,839.91, the amount which the successor of George Hobson received. The difference therefore, between the \$70,263.38 and \$30,839.91, is the real deficiency claimed by the plaintiff in this case, and for which suit upon the bond is brought.

The following questions have arisen in this case :

First, whether or not the two sundry accounts were properly in the possession of George Hobson, and have been sufficiently proved on the trial of the case.

Second, the defendants claim that George Hobson being clerk of the court of common pleas, his bondsmen are not liable for moneys in his possession as clerk of the superior court and circuit court.

Third, that Mr. Hobson is entitled to a credit for salaries paid by him to his deputies, and also a credit for his own salary for the last quarter.

Fourth, that the predecessor of George Hobson, Mr. John B. Peaslee, improperly paid money remaining in his hands to George Hobson, and should have paid it to the treasurer, and therefore the bond of Mr. Hobson would not be liable.

Fifth, that the Western German Bank wrongfully paid out money upon Mr. Hobson's check, out of funds deposited in his account as clerk, and that there should be a credit for this, and the state should look to the Western German Bank for re-imbursement.

The old sundry account amounts to \$857.57, the large sundry account to \$6,743.07. The first is divided into two items of \$693.90, one amount due in one case in the superior court, and the balance, \$193.60, is made up of various old items which have been in the possession of the various clerks of the court for a number of years. The large sundries account relates to moneys paid to the clerk by order of court. The various amounts which were received by the clerk are embraced in secs. 1341, 1346, 478, 471, 472, 473, 474, 480, 1302, 1306, 1330, 7336, 7337, and 5016, 5499, 5500, 5544, 5548, 5550, 5592, Rev. Stat.

In examining into these various accounts they may be divided into two classes. First, that which belongs to the county of Hamilton, and that which is due to outside parties. For instance, the sheriff, witness, sundries, old sundries, advance divorce costs, civil deposits, transportation, coroner and printing, amounting to \$19,169.34, and the county's portion, to-wit, clerk, criminal costs, stenographer of Hamilton county, criminal stenographer's costs, stenographer's fees and interpreter's amount to \$36,139.24.

Coming then to a consideration of the questions raised by the defendants in this case : First, were the two sundry accounts properly in the possession of Mr. Hobson, and have they been sufficiently proven? The court is inclined to the opinion that under the evidence deduced at the trial from the books, these accounts have been sufficiently proved. The old sundry account was amounts of money received by clerks heretofore that remained in their hands, being credited to the parties entitled thereto on the books of the clerk, and being handed from one clerk to his successor from time to time. The large sundry account embraces amounts paid in by order of court in inter-pleader suits, and various other kinds of litigation, and the court is of the opinion that they were properly in the possession of Mr. Hobson, as clerk of the court, excepting in cases :

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No. 74854	\$30 00
No. 74853	5 15
No. 69794	10 18
Total.....	\$45 28

Sullivan v. State, 121 Ind., 342; Morgan v. Long, 29 Iowa, 434; McDonald v. Ahryens, 18 Neb., 568.

Sufficient appears from the papers and entries to show that the court had before it an existing state of facts and law, which would authorize it to make the orders that were made, and this court should presume that all courts acted according to law, and made the order that was made in accordance with a state of facts existing which would warrant the orders.

Section 5592, Rev. Stat., is a general statute, authorizing the payment of money into court. In addition to this, sec. 1325, Rev. Stat., provides that the clerk shall be the receiver of all moneys payable into his office, whether collected by public officers of the court or tendered by others. This last section must be an additional provision to any of the foregoing. We must construe sec. 1325, Rev. Stat., whereby the clerk is made a receiver of moneys, payable into his office, as being in addition to the other statutory duties, providing for the receipt of money, devolving upon him.

The clerk is the legal custodian of the records and files of the court as well as of money coming into the hands of the court through the exercise of its judicial functions.

Money has been brought into court by defendants in actions at law under the common rule from the earliest times.

In equity the payment of money into court by the plaintiff is often required as a condition of a decree or order. See *Tuch v. Manning*, 150 Mass., 217.

The payment of money into court is most usually ordered on interlocutory application, where persons as trustees have money in their hands to which the plaintiff can make out a prima facie title. 2 Dan'l Chan. Plead. & Practice, 1770.

Under the statute, the clerk must perform the duties of a clerk at common law. It is only by the legislative power that law can be bound by phraseology and by forms of expressions. The common law eludes such bondage; its principles are not limited nor hampered by the mere forms in which they may have been expressed; and while the court as well as counsel have not been able to find any case setting forth the actual duties of a clerk of a court at common law, yet it would seem that such a clerk was to perform any and all duties which the court might impose, or which, in the administration of the common law, he should do, or the court might order done as an exercise of its judicial functions. And therefore the clerk would be the legal custodian of money ordered paid into court by the court, or paid in on judgments.

As to the question raised with regard to the bondsmen being liable for money in the possession of Mr. Hobson, as clerk of the superior court and circuit court, when the language of the bond is as follows: "Whereas, George Hobson was duly elected the clerk of the court of common pleas, within and for the county of Hamilton, in the state of Ohio, by the qualified electors of the county of Hamilton, held on the first Tuesday of November, to-wit, November 6, 1894, and to hold his

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said office for the term of three years beginning on the first Monday of August after his election," and the condition of the bond was that, if the said George Hobson should promptly pay over all moneys that by him were received in his official capacity, as such clerk of the court of common pleas, and should enter and record all the orders, decrees and judgment proceedings of the court of which he may by law be required as such clerk, and shall faithfully and impartially discharge and perform all and singular, the duties of his said office, then the obligation shall be void, otherwise to remain in full force and effect and virtue; the court is of the opinion, that the term, "clerk of the common pleas court" "was simply his title," designated under the constitution of Ohio, art. 4, sec. 16, as such, and by virtue of the statute after his election he became clerk of the superior court and circuit court; and while he was elected as clerk of the court of common pleas, and the bond given as running to the clerk of the court of common pleas, nevertheless it would embrace all the courts of which by law he might be their clerk.

In *State v. Watson*, 38 Ark., which was a suit upon the bond of the clerk, McCanany was appointed and commissioned, by the governor, county clerk of Jackson county, Arkansas. By virtue of his office as county clerk, he was also clerk of the circuit court and master commissioner in chancery, and gave one bond for the faithful performance of his duties. In a partition suit brought in the circuit court upon which he had received money, he had failed to properly account for it, and suit was thereupon entered upon his bond. The court in that case held that the bond was liable, and cite and criticise the case cited by counsel for defendants here, that of *Hardins' Ex'rs Carico* 3 Met., 261, and uses this language: "That it often happens in the progress of suits that money is brought into court and placed in the custody of the clerk until disposed of by order of court, and it would be unsafe to hold that the clerk and sureties are not responsible on his official bond for such moneys." The court, therefore, is of the opinion that the bond would be liable for whatever shortage might exist for the amounts collected or due in the superior and circuit courts, although the bond was executed, running as clerk of the court of common pleas. See also, *Walters v. Wilkinson*, 92 Iowa, 129.

The point relating to the salaries paid by Mr. Hobson to his deputies and clerks, and also his own salary, as to whether or not these amounts should be a credit upon the amount due, the court is of the opinion that they should. While it is true, that Mr. Hobson in paying the deputies and clerks in his office did not conform to the law in the manner of payment, that is, by depositing the money with the treasurer, and then issuing a warrant to pay the clerks, nevertheless, the money so paid was due to the deputies and clerks in his office, and should have been paid to them, and so far as the bondsmen are concerned, they would have the right, under the statute, to set off against their liability any equitable claim which might exist. Therefore, so far as they are concerned, the amounts being due from the county to the various clerks and deputies, the fact that they were paid in an improper manner could not be made use of against the bondsmen, but they would be entitled to a credit for such amount.

As to the salary of George Hobson himself, the court is also of opinion that the amount due him for the last quarter, under our statutes, should also be a credit. He did not draw any of his salary for the last quarter. The statute, sec. 1348, Rev. Stat., distinctly provides that

such salary can only be forfeited upon conviction, upon indictment or information, whereby the officer should be adjudged guilty of misconduct in office. There has not been a conviction of George Hobson on these grounds, and until there has been, he would therefore be entitled to his salary. Not having drawn that salary, but it being a sum of money due him, the bondsmen would have the right to off-set that amount also against the amount claimed by the state from them.

As to the \$1,246.00 drawn from the Western German Bank, the evidence shows that George Hobson opened an account in that bank, in the name of George Hobson, clerk of the courts. When money was drawn out of this account it was done by means of checks signed "George Hobson;" there was no account in the bank in the name of George Hobson, and all the checks so signed by him as above stated, were charged to the account of George Hobson, clerk of the courts. The testimony shows that the bank knew the official position and character of Mr. Hobson, but charged these checks to this account as upon the face of the checks was printed the words "County Clerk." The question therefore is whether the bank had the right to so charge these checks against the account as it appeared upon the books, and whether this amount ought not to be allowed as a credit upon the claim against the bondsmen. It is a well settled rule of law that a person who has deposited in bank, money in a trust capacity, or as trustee, cannot withdraw such money on individual checks, and if the bank knew of the trust character in which the funds were deposited, such funds could not be appropriated to individual debts. It matters not, it seems to the court, that the words "County Clerk" were printed upon the check.

Where the drawer of a check has no account individually with the bank upon which the check is drawn, but has an account there as administrator, or in some other trust capacity, it is wrong for the bank to pay the check and charge it to the trust account. *Bank of Belmont v. Bank of Barnesville*, 58 O. S., 207.

We must look to the contractual relations existing between the parties as evidenced by the account and the manner in which the checks were signed. This contractual relation was such, especially in the light of the knowledge the bank had of the official, or trust capacity of Mr. Hobson, as would preclude any other conclusion than that the amounts of the checks in question were improperly charged.

It would seem, therefore, that this amount of \$1,246.00 should be allowed as a credit against the amount claimed from the bondsmen,—See *Am & Eng. Enc. of Law*, 2 Ed., Vol. 3. p. 833; *Shepherd v. Meridan Nat. Bank*, 48 N. E. R., 346; *Baker v. New York Nat'l. Ex. Bank*, 100 N. Y., 31.

So far as the claim is made that the money paid by John B. Peaslee to George Hobson was improperly paid, and that, therefore, if any person is liable, the bondsmen of Mr. Peaslee are liable for this amount, it seems to the court is untenable.

The term of office of John B. Peaslee, as clerk of the courts, expired on Aug., 5 1895, when he was succeeded in office by George Hobson. On that day, the evidence shows that Mr. Peaslee had in his possession the sum of \$44,561.79 divided among various funds. This amount, John B. Peaslee on said day paid over to his successor, George Hobson. Since that time, George Hobson, as shown by the books, has properly accounted for and paid over a large amount of this sum to the parties who were entitled thereto, and on April 26, 1897, when he was succeeded

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in office by another clerk, he had in his possession of the moneys paid to him by John B. Peaslee, the sum of \$25,549.46. Of this amount the claim is made that the following accounts and sums, still remaining in the hands of George Hobson, should not have been paid to him by John B. Peaslee.

Criminal costs.....	\$11,500 14
Criminal stenographer's fees.....	1,147 75
Judicial stenographer's fees.....	5,636 48
Interpreter's fees.....	3 00
Total.....	\$20,345 00

These amounts, it is claimed, John B. Peaslee should have paid into the county treasury, and not to his successor. The remaining accounts, which go to make up the total sum of \$25,549.46, as above stated, it is admitted were properly paid to George Hobson. These amounts are as follows :

Sunday account.....	\$2,047 67
Civil deposit account.....	733 33
Sundry old.....	815 53
Advance divorce.....	1,155 00
Unclaimed witness' fees	452 93

Section 1340, Rev. Stat., distinctly provides that the clerk, upon ceasing to be clerk, shall pay over all money to his successor, then in his hands, received as such officer. It would seem to be a fallacy to hold, even if one clerk should improperly have in his hands money, that he would still have the right to retain that money and not surrender it, and pay it over to his duly elected and qualified successor. But the statute is broad enough, it seems to the court, to embrace all moneys, that is whether money is properly in the clerk's hands or improperly there—whatever money by virtue of his office he has received and retained in his hands at the time of going out of office, he is by the statute directed to turn over to his successor. It has been the practice for many years for the clerks going out of office to deliver to their successors in office, such moneys as may remain in their hands, and the statute can mean no less than what it says, and that is that all money (and this must mean from whatsoever source that money may come, if it comes into the clerk's hands by virtue of his office, that is, by virtue of his being clerk), should be turned over to the successor in office, and would include money for which the clerk should account. Therefore, the claim that the bond of Mr. Peaslee would be liable for such amounts rather than the bond of Mr. Hobson, does not seem to be well taken by the defendants.

Coming then to a re-capitulation of the amounts, the account of George Hobson as clerk, may be stated as follows :

In account with the state of Ohio.

Cr.

By amount paid to Mr. Monfort, clerk, by Mr. Hobson.....	\$30,854 11
By salaries.....	1,780 00
By Geo. Hobson, salary	2,430 55
By case 74.354.....	30 00

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By case 74,853.....	\$5 15
By case 69,794.....	10 13
By Amt. Western German Bank.....	1,246 69
By deficiency.....	20,002 69
	<hr/> \$72,408 68

Dr.

To amount claimed in the petition.....	\$70,263 38
To forged vouchers.....	2,145 25
	<hr/> \$72,408 68

The deficiency therefore, would seem to be \$20,002.69, for which the bondsmen would be liable, and for this amount a decree may be entered.

Readings, Foraker & Dinsmore, county solicitors, for plaintiff.

Miller Outcalt, Wilson & Herrlinger, Campbell, Bates & Meyer, and Harrison & Aston, for defendants.

DEEDS—EVIDENCE.

[Clark Probate Court.]

J. QUINCY SMITH, ADMR., v. CHARLES H. NEFF ET AL.

1. To establish the existence of an alleged lost deed, evidence was offered showing the intention of the grantor to convey the premises to the alleged grantee; that a deed of the premises was prepared, ready for the signature; that a deed of the premises in the handwriting of the one who prepared the above deed, containing the name of the grantor, and of two witnesses was seen in the hands of grantee: *Held*, that the evidence to establish an alleged lost deed must be clear and convincing; must produce in the minds of the court a conviction that a valid deed once existed; and therefore this evidence is insufficient, there being nothing to show that the alleged signatures were genuine.
2. Conviction means a mind free from doubt.
3. Stronger proof than the unsupported evidence of one person should be required to establish the existence of an instrument conveying real estate.

ROCKEL, J.

J. Quincy Smith, administrator of Harriet J. Neff, filed his petition in this court to sell certain described real estate to pay debts of decedent in which real estate he alleges said decedent at the time of her death owned an undivided half interest.

The New Carlisle Building and Loan Co., by way of answer and cross petition, denies that the said Harriet J. Neff was the owner of a one-half interest in said real estate at the time of her death, and avers that prior thereto she conveyed her interest therein to her co-tenant, J. Grant Neff, by deed, properly signed, executed and delivered, but that said deed has since been lost without having been recorded; and further avers that after the conveyance to said J. Grant Neff by his mother Harriet J. Neff, the said J. Grant Neff conveyed the same by mortgage deed to the said cross-petitioner, the New Carlisle Building and Loan Co., and that the said claim of the New Carlisle Building and Loan Co. is now a valid lien on said premises, free and clear from any and all claims of the plaintiff as administrator of said Harriet J. Neff.

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Harriet J. Neff was the mother of J. Grant Neff; she died January 18, 1893, and her son, J. Grant Neff, died in September, 1892. The alleged deed, if executed at all, was made in May, 1891. The real estate in controversy was received by devise by Harriet J. Neff and J. Grant Neff from Dr. Benjamin Neff, and was held by them in common.

No transfer appears upon the tax duplicate or of record anywhere that Harriet J. Neff ever disposed of her interest in said real estate. The records do disclose, however, that in May, 1891, the said J. Grant Neff mortgaged the entire premises to the New Carlisle Building and Loan Co. The question therefore presented is, was J. Grant Neff the owner of the entire premises at the time he executed the mortgage to the New Carlisle Building and Loan Co., or was his mother still the owner of a one-half interest therein.

Charles McGuire, secretary of the New Carlisle Building and Loan Co., testifies that at the time the mortgage was given or received by him for the company, J. Grant Neff gave to him a quit-claim deed which conveyed to said J. Grant Neff by his mother Harriet J. Neff the premises in controversy. That he, McGuire, examined the deed, saw that it was signed Harriet J. Neff, witnessed by two persons and acknowledged before a notary public.

He does not remember the names of the subscribing witnesses or the notary public. Neither does he testify that he is familiar with the signature of Harriet J. Neff.

He further testifies that he gave the deed to Charles H. Neff, a brother of J. Grant Neff, to take it to Springfield and have it recorded. And that the deed was in the handwriting of B. H. Raunels, Esq.; that he looked at it carefully for the reason that as secretary of the association it was his duty to see that J. Grant Neff had title, before the money was paid over to him on the mortgage he had given to the association. Charles H. Neff does not remember much about the matter; thinks there might have been a deed left with him as Mr. McGuire says, but cannot now say much about it; that it was his mother's intention, he feels pretty well satisfied, but whether there ever was such conveyance he is not now able to state.

B. H. Rannels Esq. testifies that he prepared a deed ready for signature conveying the premises in question and gave the same to J. Grant Neff for his mother to sign. No evidence of change of possession, control or other evidence of ownership is given.

These are the facts submitted to the court by the cross-petitioner, the New Carlisle Building and Loan Company. Are they sufficient to justify a court in finding that there was a conveyance of the land in controversy by Harriet J. Neff? I think not. The testimony is too frail to work a conveyance of real estate which the law has always guarded with a most zealous care. If transferred by deed or passed by will, the only way in which an owner of real estate can convey the same, is by deed, duly acknowledged, and at least two witnesses must attest his signature to the instrument of writing conveying the same, for real estate cannot be conveyed by oral contract, and it must be made a matter of record. Why these precautions, if one person, with slight supporting evidence, can, after the death of all the parties, give testimony sufficient to warrant a conveyance?

This case rests practically upon the evidence of Chas. McGuire. The testimony of Neff is of no particular consequence, and that of Rannels of but little value. Leaving out of question the fact that McGuire

is to a certain extent an interested witness, for I have absolute faith in his honesty, but knowing the fallibility of mankind and frailty and fickleness of man's memory, I should be loath ever to sanction a doctrine that would transfer the title to real estate upon the unsupported evidence of any one person. Judges and lawyers are fully aware how often it turns up during the progress of a trial that an honest, positive, capable and conscientious witness has given testimony that is impossible to be true. From some error of the senses he has formed a wrong conclusion which has led him to an honest mistake. It would be exceedingly dangerous to permit the title to real estate to rest upon such an uncertain foundation. It is true that our courts have said that no particular kind of description of testimony as to the loss, execution or contents of such instrument is absolutely requisite. But, they have also said, that the evidence in order to be sufficient must, when taken as a whole, produce conviction in the mind of a jury that a valid deed once existed and became lost. *Blackburn v. Blackburn*, 8 Ohio, 81, 85.

But what will justify a court in reaching that conviction? Conviction means a state of mind free from doubt. Will the law be so absurd as to say that during a man's lifetime his real estate can only be transferred by a written instrument signed by himself in the presence of two witnesses, but that after his death his property may be conveyed away, his heirs defrauded and his creditors deprived of their just dues by the oral, unsupported evidence of a person whom he never knew?

If that were true title to real estate would indeed hang upon a very slender thread. It is a general rule that the testimony of a single witness relevant for proof of the issue in the judgment of the judge and credible in that of the jury, is a sufficient basis for a decision both in civil and criminal cases. (Best on Evidence, sec. 596.)

In discussing this rule further, on the same learned, logical author says—(sec. 597): "Still, however, on the trial of certain accusations, which are peculiarly liable to be made the instruments of persecutions, oppression, or fraud, and in certain cases of pre-appointed evidence (where parties about to do a deliberate act, may fairly be required to provide themselves with any reasonable number of witnesses, in order to give facility to proof of that act), the law may with advantage relax its general rule, and exact a higher degree of assurance than could be derived from the testimony of a single witness."

Evidence sufficient to establish an alleged deed must be clear and convincing—it must produce in the minds of the court a conviction that a valid deed once existed. The present case, beyond the fact that there is but one witness to support the alleged deed, shows other reasons for its insufficiency to convince the court.

Suppose that McGuire did see a deed to which was attached the name of Harriet J. Neff as grantor, attested by the names of two subscribing witnesses; what is there to show that the signatures thereto were genuine, or that the deed ever came rightfully into the hands of the grantee. The instrument might have been forged, or if genuine, stolen from the grantor. There is no evidence of delivery of the deed other than the mere fact that it was found in the possession of the alleged grantee.

Proof of delivery and execution are both requisite to establish the deed in question. In *Gilmore v. Fitzgerald*, 26 Ohio St., 171, it was held that "Where parol evidence is relied on to prove a deed alleged to have been lost, such evidence must clearly and satisfactorily show the exist-

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ence and execution of the supposed deed, and so much of its contents as will enable the court to determine the character of the instrument." Such satisfactory proof has certainly not been produced in the present case.

So far I have only considered the case upon the evidence of the cross-petitioner, and am satisfied that its evidence will not support its claims. But when it is further considered that a blank deed was found in the possession of Chas. H. Neff describing the premises in controversy, and in the hand writing of B. H. Rannels the conviction is strengthened that this was the deed or supposed deed seen by Chas. McGuire.

The finding therefore will be against the cross-petitioner, the New Carlisle Building and Loan Co., and that the allegations of the petition are true, that Harriet J. Neff died seized of the premises in controversy.

Geo. C. Rawlins & H. C. Stafford, for plaintiff.

B. H. Rannels, for cross-petition.

EXECUTORS—NOTICE BY PUBLICATION.

[Clark Probate Court.]

IN RE ESTATE OF FREDERICA RINGWALD.

Section 6088, Rev. Stat., requiring publication of notice of appointment of an executor, is not complied with by a publication of such notice in a German newspaper of general circulation. The publication must be made in an English newspaper.

ROCKEL, J.

This matter comes up upon the inquiry of the executor of Frederica Ringwald whether he can, so as to comply with the law, publish the notice of his appointment as executor in the "Adler," a newspaper of considerable and perhaps you may say general circulation, in this city and county.

He states that the deceased was a German, and nearly all her business transactions with people of that nationality, and that more persons having an interest in her affairs would be informed who her executor was, by having the same published in the "Adler," than if it was published in an English newspaper of general circulation in the city and county.

The statute provides (Sec. 6088.): "Every executor or administrator shall, within three months after giving bond for the discharge of his trust, cause notice of his appointment to be published in some newspaper of general circulation in the county in which the letters were issued, for three consecutive weeks."

It will be observed that nothing is said in what language the paper is to be printed. The decision therefore of the Supreme Court in *Cincinnati v. Bickett*, 26 O. S., 49-55, becomes decisive of the matter at bar. In this case it is said (p. 55.): "While there is some conflict of authorities on the question, we think it the safer and better rule to hold, as we do, that where a statute of the state requires a publication to be made in a newspaper, a paper published in the English language is to be intended, unless the contrary is expressed or indicated."

EMINENT DOMAIN.

[Clark Probate Court.]

FREDERICK RAPP V. OHIO SOUTHERN R. R. CO.

1. The words "owner or owners" as used in sec. 6448, Rev. Stat., if unlimited, might possibly include the owner of an equitable as well as a legal title. But when it is said that the petition must allege that the corporation has no right, legal or equitable, to such lands, it is certainly questionable whether the legislature did not mean that the petitioner must be the legal owner.
2. In a proceeding under sec. 6448, Rev. Stat., to compel a corporation to appropriate certain lands upon which it has entered, the person seeking to compel such corporation to condemn such property must be the owner of the legal title.
3. Where the owner of certain lands conveys them through a trustee to his wife, to be reconveyed to him at some future time, and afterwards, on failure or refusal of such person to reconvey, such owner accepts for his interest therein a certain sum of money: Held, that such owner has no interest, either legal or equitable, in such land that can bring him within the usual acceptation of the meaning or use of the term "owner of land," and therefore, he can not maintain an action as provided for in sec. 6448, Rev. Stat.

ROCKEL, J.

The plaintiff has filed the following petition :

"In Probate Court, Clark county, Ohio.

"Frederick Rapp, plaintiff, v. The Ohio Southern Railroad Co., defendants.

"The defendant is a railroad corporation duly organized under the laws of Ohio, and authorized to appropriate personal property.

"Plaintiff says that on the first day of December, 1877, he was the owner in fee simple of the premises hereinafter described, that being engaged in the business of selling intoxicant liquor, and not wishing to hold real estate in his own name, he entered into an agreement with his wife, Christiana Rapp, by which he was to convey said premises to her, through a trustee, to be held by her in trust to be reconveyed to him on his request.

"Plaintiff says that in pursuance of such agreement, he and his said wife, on the first day of December, 1877, conveyed said premises to one Thomas J. Thompson in trust to be conveyed to plaintiff's said wife; that afterwards, on the fifth day of December, 1877, said Thompson conveyed said premises to plaintiff's said wife, and that both of said deeds, while they cite a consideration of 'one dollar and other valuable considerations,' were in fact without consideration.

"Plaintiff says that on the fifteenth day of August, 1890, he and his said wife Christiana Rapp, conveyed said premises to their son-in-law, Seward Hayes, under a verbal agreement with said Hayes to pay plaintiff's said wife \$1,900.00, and upon the further agreement with said Hayes that the undivided one-half of said premises should belong to plaintiff, and that said Hayes should mortgage said premises for \$2,600.00 for the purpose of paying said \$1,900.00 to plaintiff's said wife, Christiana Rapp, and a mortgage then upon said premises, amounting with interest and the cost of making said deed and obtaining said mortgage loan, to about \$700.00; that said Hayes after making said mortgage, was to convey the undivided one-half of said premises to plaintiff, and upon the payment of said mortgage of \$2,600.00 by him and his saving plaintiff from the payment of any part of said \$2,600.00

and any interest thereon, the remaining undivided one-half of said premises should belong to said Hayes.

"Plaintiff says that in pursuance of said agreement he and his said wife conveyed said premises to said Hayes, and that said Hayes and wife in pursuance of said agreement duly executed and delivered to one William Foos a mortgage on said premises to secure the payment of said Hayes' note made to said Foos for the sum of \$2,600.00, dated August 15, 1890, and bearing interest from date at the rate of eight per cent., which mortgage was on the fifteenth day of August, 1890, filed for record in the recorder's office of Clark county, Ohio, and said Hayes on said date out of the money obtained by said mortgage, paid to plaintiff's said wife, Christiana Rapp, the said sum of \$1,900, and the balance for the release of said prior mortgage, costs etc.

"Plaintiff says that frequently thereafter he requested said Hayes to convey to him the legal title to the undivided one-half of said premises, but that said Hayes refused so to do and thereafter, on the seventeenth day of February, 1891, a written agreement was entered into by plaintiff with said Hayes and wife which is hereto attached marked 'Exhibit A' and made a part hereof; that said contract was left at the office of the recorder of Clark county, Ohio, for record on February, 1891, at 11:20 o'clock A. M., and was recorded in vol. 10, page 578, deed records of said Clark county, Ohio.

"Plaintiff further says that he is the owner of the undivided one-half of the premises above referred to, which are described as follows: Situate in the city of Springfield, Clark county, Ohio, and bounded as follows: viz.:

"Beginning at the northwest corner of lot number one of Demint's plat of Springfield; thence along the east line of Limestone street N. 1 degree E. 63.85 feet; thence still along the east line of Limestone street, N. 5 degrees 30 minutes, E. 22.40 feet to a cross in a stone, thence S. 85 degrees 09 minutes, E. 76.90 feet to a stone; thence S. 34 degrees 53 minutes, E. 58.25 feet to a cross in a stone; thence S. 13 degrees 08 minutes, 74.80 feet to a stake; thence N. 51 degrees 30 minutes, W. 54.80 to a stake in the north line of said lot number one of Demint's plat of Springfield; thence along the north line of said lot number one N. 89 degrees 15 minutes, W. 84.44 feet to the place of beginning.

"Plaintiff says that the defendant with notice of plaintiff's ownership, has taken possession of and is occupying said land and has removed valuable buildings, quarried and removed valuable building rock therefrom, and the said premises have not been appropriated or paid for by said corporation, the defendant, nor is the same held by any agreement in writing with plaintiff, and said defendant has no right, legal or equitable, thereto.

"Plaintiff says that on October, 1893, he caused a notice to be served on defendant, in writing, notifying it to proceed, under the statute, to appropriate said lands, as required by law, a copy of said notice, showing manner of service, is hereto attached and marked 'Exhibit B,' and made part hereof; that more than ten days have elapsed since the service of said notice, and said defendant has failed to proceed, as required thereby.

"Plaintiff prays that such steps may be taken, as are authorized by law, to appropriate plaintiff's interest in said land to the use of said corporation, the defendant, and to compensate plaintiff therefor.

"Amos Wolfe & Summers & Beard, plaintiff's attorneys.

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"State of Ohio, Clark County, ss.

"Frederick Rapp, plaintiff, being first duly sworn, says that he believes the statements of the foregoing petition to be true.

FREDERICK RAPP.

"Sworn to before me and subscribed in my presence this third day of November, 1893.

(Seal.)

"F. M. HAGAN, Notary Public."

Copy of Agreement, "Exhibit A:"

"Articles of agreement entered into on this seventeenth day of February, A. D. 1891, by and between Frederick Rapp, party of the first part, and Seward Hayes and Caroline Hayes, his wife, party of the second part, witnesseth; that whereas said party of the first part is the owner of the undivided one-half interest in the real estate situate on North Limestone street in the city of Springfield, Clark county, Ohio, and being the property upon which said party of the first part now resides, and being described as follows: viz.: being lot upon which are located the following numbers, 122, 124 and 126, including buildings and lot, and whereas the said Seward Hayes now holds a deed for the whole of said real estate, and whereas said Hayes is about to remove from the city of Springfield with his family, it is agreed by said parties hereto as follows: that said party of the first part is to reside with said party of the second part until said property can be sold, and out of the proceeds after the mortgage is paid, now on said property amounting to twenty-six hundred dollars, in favor of William Foos, said party of the first part is to receive fifteen hundred dollars out of the purchase money, and said party of the second part agrees to board and support said party of the first part free of charge, up to the time that said property is sold, as aforesaid, and said fifteen hundred dollars is paid to said party of the first part, and said property is to be placed in the hands of some competent real estate agent to be sold at once, and must be sold for a sum sufficient to pay said mortgage and to pay said party of the first part fifteen hundred dollars in cash.

"In testimony whereof said parties have hereunto set their hands this seventeenth day of February, A. D. 1891.

"FREDERICK RAPP,
"SEWARD HAYES,
"CAROLINE HAYES.

"Executed in the presence of
"EDWARD P. TORBERT,
"AMOS WOLFE."

To this petition a general demurrer has been filed. One of the grounds upon which it is claimed the demurrer should be sustained is, that the allegations of the petition show the plaintiff to be the owner of only an equitable interest, if he has any at all, in the land which it is sought to compel an appropriation. In other words, it is claimed that the person seeking to compel a corporation to condemn under sec. 6448, must be the owner of the legal title.

This is a question upon which I find no reported decision.

In the present case, it seems to me, it will not be seriously contended that Rapp had more than an equitable title to the undivided one-half of the premises in the petition described.

The petition shows, that for different reasons, he made two conveyances of the legal title to the property. First in December, 1877, he

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conveyed to a trustee, to be conveyed to his wife. And again in 1890, he joined with his wife in a conveyance to Hayes. I know that Rapp claims that there was a trust connected with each one of these conveyances, but until the trust was executed and a reconveyance made to him, he was the owner of but an equity, the legal title remaining where he had put it, in Seward Hayes. It is an impossibility for two persons at the same time to have the legal title to the same interest in real estate.

If one has the legal title, the greatest title another can have is an equitable title. That is, to possess rights sufficient to go into a court of equity, and compel the owner of the legal title to transfer such legal title to him. Trusts are the commonest, I might say almost exclusive source of equitable titles. This action is brought under sec. 6448, Rev. Stat. This section, as applicable to the case at bar, is as follows:

"When a corporation, authorized by law to make appropriation of private property or the land named in 6439 of this chapter, has taken possession of, and is occupying or using the land of any person, * * * and this land so occupied or used has not been appropriated and paid for by the corporation, or is not held by any agreement in writing with the owner thereof, * * * such owner or owners, or either of them, * * * may serve notice, in writing, upon the corporation in the manner provided for the service of summons against a corporation, to proceed under this chapter to appropriate the lands, and on failure of such corporation for ten days so to proceed, said owner or owners, * * * may file a petition in the probate court of the proper county setting forth the fact of such use or occupation by the corporation, that the corporation has no right, legal or equitable, thereto, * * *."

The words, "owner or owners" as used in this section, if unlimited, might possibly include the owner of an equitable as well as a legal title. But when it is said that the petition must allege that the corporation has no right, legal or equitable, to such lands, it is certainly questionable whether the legislature did not mean that the petitioner must be the legal owner.

This allegation was not required by the original act of April 16, 1865, 62 O. L., 85. But was added by the act of April 23, 1872, 69 O. L., 95.

The act of 1865 provided merely that the owner might file a petition, not specifying what it should contain, and therefore when it was provided that the petitioner must allege that the corporation must not hold the property by any right, legal or equitable, and there being in the usual sense of the term but two ways of holding title to property, to-wit: legal and equitable, the necessary conclusion follows, that it was intended that the plaintiff must be the holder of the legal title before the action can be maintained. For if the plaintiff has but an equitable title, out of possession, the defendant, by the mere fact of possession, might be held to hold the land by a superior right to that of the plaintiff.

And therefore, if the petition alleges that the defendant has no right, legal or equitable thereto, and also shows that the defendant is in possession, and the plaintiff is but the holder of an equitable title, such allegation is contradictory, and cannot be accepted as true.

Besides it might properly be assumed that if the plaintiff had only an equitable title and the corporation was in possession, that it was in possession under a legal title.

In re Wm. J. George, 3 Ohio Circ. Dec., 104, the court, on page 106, says: "It is only when the railroad company has no legal or equitable

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estate to the premises that the proceedings are authorized, hence it follows that if the railroad company has a legal or equitable estate in the premises, the owner of the premises cannot resort to this section for relief, and the question of title cannot be a question for the jury."

It was further held in this case that, the fact that the corporation has no right, legal or equitable in the premises, is a jurisdictional fact, and must be found to exist before the judge has authority to order a jury. In the quite recent case of *Kramer v. R. R. Co.*, 53 O. S., 436, this dictum is at least modified, and it is held that they are issuable acts to be determined in the trial of the case.

This is a proceeding unknown to the common law, and purely one of statutory creation, yet from what the Supreme Court has said, on several occasions, I am led to believe that they look upon it as somewhat akin to the old action of ejectment in determining when the right of action may exist. In the case of *Railroad Co. v. Perkins*, 49 O. S., 330 *et seq.* it is said: "One of two things would seem to be true: either the statutory remedy against the company is a substitute for the right to recover the possession, or it is cumulative, and in each case the measure of compensation is the same. The more rational construction is, that it was intended to be cumulative, as affording the owner a speedier and more efficient remedy than an action of ejectment. * * *

"It is a mistake to say that by the wrongful entry of the company the right of the owner is turned into a mere chose in action for the value of it, and his only remedy is a proceeding under the statute to compel its appropriation. * * *

"The language imports a legislative understanding that the land remains the property of the owner until it has been condemned and paid for as therein provided."

In *Railroad Co. v. Robbins*, 35 O. S., 531, it was held that an action could not be maintained by the owner for the value of his land, on the ground that there is no action for the conversion of land: that the remedy in such case, is either to compel an appropriation by a proceeding under the statute, or to recover the land itself, as in other cases of unlawful entry.

It seems to me therefore, in the light of these decisions, proper to hold that it was the intention of the legislature to confer upon the person who held the title, the common law right to begin an action of ejectment, or by the code provision for a real action, the additional right to compel an appropriation under sec. 6448, Rev. Stat.

In an action of ejectment it was necessary for the plaintiff to hold the legal title. *Wallace v. Seymore*, 7 O., 156.

Section 5781, Rev. Stat., which is the substitute intended by the code for the action of ejectment, provides:

"In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has a legal estate therein, etc."

I am of the opinion therefore that in order to maintain the action provided by sec. 6448, Rev. Stat., the plaintiff must have the legal title to the land which he is endeavoring to compel a corporation in possession to appropriate.

Since the above was written, I have reviewed *Kramer v. R. R. Co.*, 53 O. S., and *Shauck, J.*, uses the following language:

"Although the land of which the company took possession is a public highway, its occupation for the purpose alleged in the petition,

imposed upon it an additional servitude for which the plaintiff, as owner of the fee, is entitled to compensation; and his right in that regard, the company having taken possession without appropriation and without the owner's consent, may be enforced under the provisions of sec. 6448, Rev. Stat."

It will be noticed here, that he calls attention to the fact that the plaintiff, "as owner of the fee," has a right to maintain the action.

Thus far this case has been considered upon the assumption that the plaintiff had at least an equitable title to the land described in the petition, or some kind of an interest therein.

But is this true? Do the facts alleged in the petition show that the plaintiff is the owner of these lands in any sense of the term, or that he has any kind of an interest or ownership therein?

Has he anything more than a right to a certain amount of the proceeds arising from the sale of the land?

If he has no interest or ownership in the lands, there can be no question but that the plaintiff can not maintain this kind of an action.

According to the petition, what are the facts? Plaintiff was the owner of the lands described in the petition. By an agreement these lands were conveyed by him through a trustee to his wife to be re-conveyed to him at some time not designated in the petition. Thereafter, for some cause not set forth, he and his wife conveyed these premises to their son-in-law Seward Hayes, Hayes agreeing to pay certain debts and thereafter re-conveyed an undivided one half interest to the plaintiff.

Hayes and the plaintiff seemed to have some controversy about carrying out this part of the agreement, the plaintiff frequently insisting upon the performance of this part of the contract and a re-conveyance to him of his interest therein, and for some reason Hayes refusing to reconvey to plaintiff what he demanded. In order to settle this controversy, they made the agreement attached to the petition as "Exhibit A."

By this contract plaintiff acknowledges that Hayes holds legal title to all, and agrees to accept for his interest therein, the sum of \$1,500.00 when the property is sold, and his maintenance until such time as it is sold. While there is an allegation in this agreement that the plaintiff is the owner of the one-half interest in the premises, there is no agreement on the part of Hayes in the settlement of this controversy, that he will convey to plaintiff the interest he claims. But Hayes does agree in settlement of this claim of the plaintiffs, to an ownership of one-half of the premises, to place the property in the hands of a real estate agent, and when the premises are sold to give him \$1,500.00 of the proceeds, and also to keep him until the premises are sold.

This contract was not only an acknowledgment that Hayes held the legal title, but in consideration of an agreement to pay him \$1,500.00 out of the proceeds of the sale of the land and his maintenance until such sale occurs, a relinquishment to Hayes of all claims the plaintiff had to the title of such property.

The petition does not show whether or not Hayes made a sale of these premises, or that there ever was a rescission of this contract. It seems to me, therefore, that the plaintiff has no interest in the land that can bring him within the usual acceptation of the meaning or use of the term "owner of land."

All that he can possibly claim from any source whatever, is the sum of \$1,500.00, and whatever damage he may have sustained by failure of

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Hayes to maintain him until the premises are sold ; but that in no case can he recover the land itself.

The demurrer therefore, will be sustained.

Amos Wolf, George Beard, for plaintiff.

Oscar T. Martin, for defendant.

DITCH APPEALS.

[Clark Probate Court.]

A. G. EMIG V. COMMISSIONERS (CLARK CO.).

1. Section 4469, Rev. Stat., which provides that in ditch appeals, "it shall be necessary for only eight jurors to agree," to return a verdict, upon the first two propositions contained in this section, as to "Whether said ditch will be conducive to the public health, convenience or welfare," and "Whether the route thereof is practicable," is not unconstitutional, as being in conflict with secs. 5 or 19 of art. I, of the constitution.
2. It is not the right to take the property for public use that is to be submitted to a jury, but it is the amount of compensation which the owner is entitled, which the constitution requires a jury to determine.
3. The power of eminent domain is not conferred by the constitution. It simply provided mode and limitations upon its exercise. The power is an inseparable incident to sovereignty, and its exercise is conferred for the accomplishment of lawful objects, upon the general assembly. This body may exercise the right directly, or they may delegate it to another. The only thing that the judiciary can do is to see that the power is not abused, and that proper compensation be awarded the owner.
4. In ditch appeals, the jury is not in addition to the four questions specifically submitted to them, as provided for in sec. 4469, Rev. Stat., required to find that the proposed ditch is necessary.
5. If the jury find that the ditch is conducive to the public health, convenience or welfare, and the route is practicable and will be a public benefit and utility, it may justly be regarded as necessary.
6. The jury in their view of the proposed improvement are not required to traverse the exact line of the ditch, they are not required to see every foot of the proposed route, but all that is required is a substantial compliance with the law in regard to their view of the premises, as provided for in secs. 4467 and 4468, Rev. Stat.
7. The meaning of the word "premises" as used in sec. 4467 and 4468, Rev. Stat., means lands and surrounding country.

ROCKEL, J.

Some objections to the charge given have been argued and have been carefully considered by the court, but I am not convinced that any substantial error exists therein.

It was argued that the law permitting a finding of eight upon the first two propositions submitted to the jury is unconstitutional, as it involved the appropriation of private property, in which cases only the unanimous opinion of the common law jury of twelve can suffice to return a verdict.

Counsel are somewhat confused on this matter. It is not the right to take the property that is to be submitted to a jury, but it is the amount of compensation to which the owner is entitled, which the constitution requires a jury to determine.

The power of eminent domain is not conferred by the constitution. It simply provided mode and limitations upon its exercise. The power

is an inseparable incident to sovereignty, and its exercise is conferred for the accomplishment of lawful objects, upon the general assembly. This body may exercise the right directly, or they may delegate it to another. The only thing that the judiciary can do is to see that the power is not abused, and that proper compensation be awarded the owner. In the present case it would have been for the legislature by special act to have declared the necessity for the proposed ditch improvement, or the entire power could have been vested in the county commissioners to determine whether the public health, welfare and convenience demanded or justified the improvement.

It was not required to be submitted to the jury at all, unless the legislature in its wisdom so declared. It being a matter resting solely in the legislature, it could have legally declared that an affirmative finding of any number of the jurors would have been sufficient to return a verdict in its favor.

These principles are fully recognized in *Zimmerman v. Canfield*, 42 O. S., 468, 471, where it is said, "The state has delegated to the commissioners so much of her power of eminent domain as is necessary to determine whether the construction of a ditch is so far a public necessity, as that it is demanded by considerations of public health, convenience or welfare. There is nothing in the constitution of our state which guarantees to the owner of lands traversed by a ditch a trial by jury, or other judicial investigation, to determine upon its necessity or whether it is conducive to the public good.

"While the statutes in question do provide for such a hearing upon appeal, it is so rather as a matter of favor than of right."

The commissioners, in determining the preliminary question of the necessity of appropriating lands for the purposes of a ditch, are called to the exercise of political and not judicial power. It is a question rather of political policy than of private right. *McMicken v. Cincinnati*, 4 O. S., 394; *Giesy v. Railroad Co.*, 4 O. S., 325; *People v. Smith*, 21 N. Y., 597; *Bowersox v. Watson*, 20 O. S., 507; *Cramer v. Railroad Co.*, 5 O. S., 146; *Mills Eminent Domain*, sec. 11; *Cooley's Constitutional Limitations*, 528.

"It is not upon the question of the appropriation of lands for public use, but upon that of compensation for lands so appropriated, that the owner is entitled, of right, to a hearing in court and the verdict of the jury."

The court was asked to require the jury in addition to the four questions specifically submitted to them, in accordance with sec. 4469, Rev. Stat., to find that the proposed improvement is necessary. This instruction is based upon the first sentence of sec. 4462, Rev. Stat., where it is said: "If the jury find that the improvement is necessary and and the same will be conducive to the public health, convenience or welfare, and is practicable, the commissioners shall apportion the compensation, etc." It is rather difficult to give a reason for the existence of the first sentence of this section.

The law only recognizes four questions to be submitted to the jury in the sections relating to appeal in this kind of cases and to the form of verdict required. And further it seems to me that a finding that the proposed ditch would be conducive to the public health, convenience or welfare, is equivalent to a finding that it was necessary. *Cory v. Swager*, 22 Ind., p. —, it is said: "The petition does not in terms infer that there is any necessity for the ditch, nor does it attempt to specifically

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state facts directly showing a necessity for the establishment of the ditch petitioned for. It does, however, aver that the construction of the proposed ditch will be conducive to the public health, convenience and welfare, and will be a public benefit and utility. We think a ditch that is conducive to the public health, convenience and welfare and which is also a public benefit and utility, may justly be regarded as necessary. It is evident that the legislature did not use the word necessity as meaning that which is absolutely requisite, but as meaning that which is essentially requisite. Certainly what will benefit the public and conduce to the general health and welfare, may be regarded as possessing the quality of being necessary." This sentence was inserted by the codified commission, and it occurs to me that it can only be considered as a tautological expression. If the jury find the ditch is conducive to the public health, convenience or welfare, and the route is practicable, as a question of law it could not be held otherwise than that they also found it necessary.

It is also alleged that there was misconduct in the jury in their view of the proposed improvement. The alleged misconduct is this, that the jury at one point diverged from the line of the ditch to a natural water course about 800 feet distant, that when they again approached the line of the ditch it was about 400 feet below the place where they left. At another place they again diverged from the line of the ditch about the same distance, and when they again reached the line of the ditch, they were about 800 feet from the place where they had left it, thus making about 400 feet at one place and 800 feet at another place where they did not go over the exact line of the ditch. These divergences it is admitted were made in inspecting the surrounding premises.

The 400 feet omitted was cleared land over which I have no doubt the jury could plainly observe the nature of the land, its qualities and capabilities of being drained. The 800 feet was covered by a thick growth of willows and underbrush and it is probable that the exact line of the ditch was not seen over this entire 800 feet by the jury, but it is not much doubt but that a large portion of it was seen by the jury from the points where they left it and where they returned to it, thus leaving a very small part of the exact line of the ditch not seen by the jury. The divergence at this point was made for the purpose of examining some low land which it was claimed the proposed ditch would drain.

This was a proper thing for the jury to do. The law does not require that the exact line of the ditch should be traversed over, but it is required that they "should view the premises along the route" as provided in sec. 4467, Rev. Stat., and that they should fully examine the premises, as provided in sec. 4468, Rev. Stat. Premises here means lands and surrounding country. I take it that the law means that the jury should view the lands that would probably be benefited by the proposed improvement. That they are not required to see every foot of the route proposed, and that all that is required is a substantial compliance with the law in regard to their view of the premises. Besides, in the present case, the surveyor who accompanied them says that the entire route was viewed by the jury, and the presumption is that the jury made substantial compliance with the instruction of the court upon this matter before the view was made, and that they made such examination of the premises as was required of them by law and the oath which they had given.

Furthermore, the entire route in all its various phases was gone over in detail by the testimony of witnesses in open court. I am not convinced that there was such misconduct of the jury as resulted prejudicially to rights of the plaintiffs in this case.

Motion will therefore be overruled.

EXECUTORS AND ADMINISTRATORS.

[Clark Probate Court.]

J. QUINCY SMITH, ADMR., v. JENNIE HAYWARD.

1. Where an executor has borrowed money and used it to pay a debt of the testator, and such executor has filed his final account and the same has been approved; and afterwards the administrator of the devisee of such testator has obtained leave to sell the lands devised, and the same have been sold and the proceeds paid into court: *Held*, that the creditor of such executor cannot intervene and have his claim against such executor paid out of the proceeds of this sale.
2. An executor or administrator has no authority to borrow money to pay the debts of the estate, and the debt therefore, at the time of its creation could be none other than the individual debt of the executor or administrator.
3. Such a debt cannot, therefore, constitute a lien on the premises, until so decreed by a court of equity. *Quare*, whether such a decree could be obtained.
4. Where one is under no obligation to pay the debt of another, payment of such debt does not subrogate him to the rights of the creditor.
5. Where an executor does not choose to reimburse himself for debts due him from the estate, *quare*, whether an individual creditor of such executor, in an action in the probate court, could compel him to do so; such action should be sought in a court of general equity jurisdiction.
6. When a final account has been filed and approved, it cannot be attacked in a collateral proceeding; as probate courts, being courts of record in the fullest sense, their records import absolute verity.
7. By the approval of the final account of the executor—a finding that the estate has been fully settled—title passes free and clear to the devisees.

ROCKEL, J.

In May, 1889, Benjamin Neff died testate seized of the premises in the petition described, devising a one-half interest therein to his son J. Grant Neff and the other half to his widow, Harriet J. Neff. Charles H. Neff qualified as executor of his father's estate.

On June 24, 1894, Charles H. Neff filed what purported to be a final account and settlement of his trust. This account was duly advertised and heard on October 1, 1894, and as appears from the journal entry made thereon, was accepted as a full and final account, the receipts and expenditures equaling each other.

According to this finding, the estate of Benjamin Neff was fully and finally settled, and there was nothing due any one from such estate. It however appeared in this account that Charles H. Neff had paid out more in payment of the debts of said Benjamin Neff than he had received from the assets of the estate. The account stated that the balance needed in making receipts equal the expenditures was donated by said Charles H. Neff and his mother, the widow of Benjamin Neff.

No exceptions were ever filed to this account or motion to set the same aside or open up other than what appears in the defendant Black's answer and cross-petition herein.

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On August 1, 1894, after the filing of this final account by Chas. H. Neff, J. Quincy Smith as the administrator of J. Grant Neff, filed his petition to sell the real estate devised to said J. Grant Neff, making all proper and necessary parties, defendants. About six months thereafter, on January 19, 1895, a finding thereon was had in this court, and the premises were ordered sold, and the allegations of the petition averring that said J. Grant Neff died seized in the premises, were found to be true.

After considerable time had elapsed, on November 27, 1895, said premises were sold at public auction and the sale was confirmed. The proceeds of said sale are still in court. On February 1, 1896, John Black filed the following paper herein:

"State of Ohio, Clark county, Probate court.

"ANSWER.

"J. Quincy Smith, Administrator *de bonis non* of the estate of J. Grant Neff, deceased, plaintiff, v. Charles H. Neff et al., defendants. No. 612.

"Now comes John Black, defendant herein and leave of court being first had, files this his answer and cross-petition, as follows:

"Defendant admits that J. Grant Neff died seized of the legal title to the lands in the petition described, but says he was possessed of said legal title only, and had no interest therein or any value whatever, for that all of his interest therein was derived by devise from Benjamin Neff, who died insolvent, said lands being wholly insufficient to pay the just debts of said decedent.

"CROSS-PETITION.

"By way of cross-petition herein this defendant says that on the eighth day of April, 1892, Charles H. Neff, co-defendant herein, who was at the time the executor of Benjamin Neff, deceased, borrowed of this defendant \$1,000.00 and gave his note therefor, which said note and the interest thereon, excepting interest for one year, is still due and unpaid; that said Charles H. Neff as such executor as aforesaid, on the eleventh day of April, 1892, paid said \$1,000.00 to D. M. Barrier of Dayton, Ohio, on a note of said Benjamin Neff, deceased, due to said Barrier, and said Charles H. Neff took credit for said sum of \$1,000.00 on his account as executor aforesaid of said Benjamin Neff, deceased. Said \$1,000.00 so paid to said D. M. Barrier was a lien on the lands of Benjamin Neff, deceased, which said lands were devised to plaintiff's decedent by Benjamin Neff, and are the same lands described in plaintiff's petition herein.* That when said Charles H. Neff filed his final account as executor of the estate aforesaid, there was due to him a large sum, to-wit: \$5,156.27 for money advanced by him to pay the debts of said estate, of which said debts the aforesaid \$1,000.00 so paid said D. M. Barrier was one; that Charles H. Neff as such executor failed to sell the real estate of his decedent, and in fraud of his creditors of whom said John Black was one, said Charles H. Neff in his final account filed July 27, 1894, included an item of credit of said estate of \$5,156.27 as donated by Harriet J. Neff and Charles H. Neff, \$4,056.27 of which purported to be and was donated by said Charles H. Neff, who at the time was largely and notoriously insolvent.

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"And afterwards to-wit: on the sixth day of September, 1894, said Charles H. Neff represented to this defendant that the estate of Benjamin Neff was indebted to him in the sum of more than \$4,000.00 for money advanced by him to pay debts of same, of which the \$1,000.00 furnished by this defendant was a part of said money so advanced, and the debt due D. M. Barrier so paid was one of said debts, and on said date said Neff executed and delivered to said Black a written transfer for \$1,000 of the above amount due him from said estate, of which transfer the following is a copy, to-wit:

"New Carlisle, Ohio, September 6, 1894.

"For value received I hereby transfer and assign to John Black or order or assigns the sum of one thousand dollars of the money due me from the estate of Benjamin Neff, deceased, whether the same be due me by reason of the payment by me of debts of said estate as executor of said Benjamin Neff, deceased, or for any other reason or right whatever.

CHARLES H. NEFF."

The above transfer was made for the purpose of enabling said John Black to procure his money so furnished as aforesaid for the benefit of said estate of Benjamin Neff, deceased, and the plaintiff herein is seeking to appropriate the real estate of which Benjamin Neff died seized, to his own use for the purpose of paying the debts of a legatee of Benjamin Neff, deceased, in violation of the rights of this defendant and the creditors of said Benjamin Neff, deceased. This defendant further says the plaintiff in this action, J. Quincy Smith, is, and for years past has been one of the officers of the New Carlisle Bank; that he was appointed administrator *de bonis non* herein at the instance and for the benefit of said bank. That the lands in said petition described were sold by him and bought for said bank at much less than their real value; that the plaintiff and the officers of said bank at the time of the bringing of this action and long prior thereto, knew that Benjamin Neff was insolvent: that Charles H. Neff was insolvent, and that his pretended settlement of and donation to Benjamin Neff's estate was a fraud upon the creditors of said Charles H. Neff, and said bank is now claiming the money arising from the sale of the lands herein, well knowing that in justice and equity they are not entitled thereto.

By reason whereof this defendant asks that the account filed in this court by Charles H. Neff as his final account, be opened up, restated and corrected so as to show the true indebtedness from said estate to said Neff. That an administrator *de bonis non* be appointed of the estate of Benjamin Neff, deceased. That the sale of the lands herein be set aside, and ordered sold by said administrator so to be appointed. That this defendant be subrogated to all the rights of D. M. Barrier and Charles H. Neff in said lands and the funds arising from the sale thereof, and in the event the court should refuse to set aside the sale aforesaid, the defendant asks that the funds now in the hands of the court, arising from the sale of same, be paid to the administrator of Benjamin Neff, so to be appointed as aforesaid, to be distributed as above indicated, and that he may have such relief as he in justice and equity may be found entitled to.

"Ellis H. Kerr, attorney for John Black.

"State of Ohio, Clark county, ss.

"John Black being sworn says the allegations in his foregoing answer and cross-petition are true as he verily believes.

"JOHN BLACK.

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"Sworn to before me by said John Black and by him subscribed in my presence this second day of January, 1896.

(Seal.)

"H. N. TAYLOR,

"Notary Public, Clark County, O."

There was some objection made at the time of the filing of this cross-petition, claiming that the matters alleged therein did not entitle Mr. Black to be made a party defendant. But he was finally permitted to file this answer and cross-petition with the understanding that the matter would be more fully investigated when considering the question upon demurrer which the court was informed the plaintiff would file to said answer and cross-petition.

The demurrer was filed, alleging three grounds.

First—That the court has no jurisdiction of the subject-matter of the action, set forth in said answer and cross-petition.

Second—That there is a misjoinder of causes of action stated in said answer and cross-petition.

Third—That said answer and cross-petition does not state facts sufficient in law to constitute a defense to the petition of the plaintiff herein.

These grounds will be considered together in the character of a general demurrer, which I think for the reasons following, ought to be sustained. At the time this petition was filed by the plaintiff, the account of Chas. H. Neff as executor of Benjamin Neff in full and final settlement of his trust, had been filed in this court, and thereafter, long before judgment was rendered in this cause and after due publication, it was approved and found by this court that said estate had been fully settled.

By this finding, that the estate had been fully settled, the title passed free and clear to the devisees of Benjamin Neff, one of whom was J. Grant Neff, deceased. As soon as the debts of Benjamin Neff were paid, the devisees under his will took a clear title.

It matters nothing to these legatees in the absence of clearly established fraud, who paid these debts. If Chas. H. Neff of his own volition paid these debts, the devisees could not have prevented him so doing. If the defendant Black has an equity, for it is not claimed that it is anything more than an equity, in the funds arising from the sale of the real estate in question, it is by reason of some act of Chas. H. Neff, and not from any act of Benj. Neff, deceased, or J. Grant Neff, for it is not alleged that said Black had a debt against said Benjamin Neff, but merely that he advanced the money which was used by the executor in the payment of a certain debt against said estate. It does not appear by the cross-petition that at the time said executor procured the money, from said Black, that he did it as executor, or that there was any agreement that said Black should be reimbursed from the funds of the estate of said Neff, or that it was necessary for said executor to procure said loan for the purpose of preserving the estate of said Benjamin Neff.

The inference is that the loan was made to Chas. H. Neff in his individual capacity, and no other fund or property was looked to as security for the same. For the agreement or assignment set up in the cross-petition, in which Neff assigned to Black whatever claim there was due and owing him from the estate of Benj. Neff, was made after the account was filed.

Besides, an executor or administrator has no authority to borrow money to pay debts of the estate, and the debt therefore at the time of

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its creation could be none other than the individual debt of Chas. H. Neff to John Black. And therefore, unless Black has some peculiar equity in the case, he stands upon the same plane as any ordinary creditor of Chas. H. Neff, and only has a right to what there might be due said Neff from Benj. Neff's estate.

In either case, however, before the title of J. Grant Neff can be affected, it will require the opening up and setting aside of the order made in this court approving the account hereinbefore filed, as the account of Chas. H. Neff, in final settlement of the estate of Benj. Neff. This cannot be done in this action. Probate courts are courts of record in the fullest sense, and their records import absolute verity. And when a matter properly within the jurisdiction of the court has received the consideration of the court, and a finding is made thereon, such finding cannot be attacked or set aside in a collateral proceeding.

If such a proceeding or order is attacked or set aside, it must be done directly in an action for that purpose.

Therefore, so far as this action stands, it must proceed on the theory that the account filed in this court on June 24, 1894, by Chas. H. Neff as executor of Benj. Neff, is correct, and that said estate was finally settled, and that at the time the order of sale was made in the case at bar, the title to the premises in the petition described vested in J. Grant Neff, or his legal representatives.

It may be that if the cross-petitioner Black can show that the money he paid C. H. Neff went to and did pay off the debt of Benj. Neff's estate, that a court of equity in an action brought for that purpose and with all parties in interest properly before it, might decree it a lien therefor upon a fund arising from the sale of the land of the said Benj. Neff. But I do not think it can be done in an action of this kind.

This is an action to sell real estate of said J. Grant Neff to pay his debts, and the administrator was only bound to make such persons parties, as the records might disclose to have a lien on the premises, or such other parties as he might deem prudent to have brought in to adjudicate their claims in order to advance the sale of the premises. Until decreed so by a court of equity, the claim of John Black could not be a lien upon the premises in question. Neither Grant Neff, the devisee, nor his father, the testator, incurred any obligation to John Black. From no act of theirs could the basis be gathered upon which to ground a claim for a lien upon said land. To them and their privies, the defendant Black is a stranger.

It may be admitted that it was the duty of Chas. H. Neff to sell the premises of Benj. Neff to pay his debts, and that if he paid the same, he was entitled to have the same sold to reimburse himself. But if the said Chas. H. Neff, as executor, does not choose to enforce this right, in what manner can an individual creditor of his compel him to do so? Has this court any jurisdiction in a case of that kind?

While not fully decided upon this question, I am inclined to believe that this court could not recognize the motion of an individual creditor for that purpose. Such a creditor would need to seek some other remedy through a court of general equity jurisdiction and in an original action, brought for that purpose.

This court will enforce the payment of the claims of creditors of deceased persons, but I do not believe that it will enforce a decedent's real estate to be sold to satisfy the demands of a stranger, or to satisfy the claims of a creditor of the executor of the estate.

Chas. H. Neff's action in filing his account as executor of Benjamin Neff as a final account and a full settlement of the estate, and his conduct towards defendant Black, is contradictory.

To Black he says: His father's estate is indebted to him; but in his account he says, this is not true, and makes no such demand. If Chas. H. Neff says there is nothing due him from his father's estate, and that his father's estate is fully settled, by what right can his creditors say this is not true?

The creditors of Chas. H. Neff are neither proper nor necessary parties to be considered in the administration of the estate of Benjamin Neff. If in the case at bar Chas. H. Neff would have claimed in his account that there was something due him, and then assigned the same to the defendant Black, Black might have had a stronger claim than he otherwise has.

But until the finding made in this court on the final account of Chas. H. Neff is set aside, there is nothing due him, and no right, claim or demand which he can assign or transfer. And the reasons which courts adopt for not attacking judgments of courts of record in any but direct proceedings, applies with all its force to this action.

The defendant Black seeks to strengthen his claim by the allegation that the money he loaned was used by said Neff in paying a claim against the estate of his father. But I doubt if he receives much strength from this source, from the fact that he did not rely or look to the estate of Benj. Neff for reimbursement, but solely to Chas. H. Neff in his individual capacity. Black was under no obligation to pay the debt due D. M. Barrier from the estate of Benjamin Neff, and therefore is not subrogated to any of the rights that D. M. Barrier might have had against said estate.

Upon more mature reflection, I am inclined to believe that the court ought not to have permitted the defendant Black to file this answer and cross-petition.

It will be conceded at once that Black was not a necessary party in any sense whatever to this action. At most he could only have been a proper party, and the admission of a proper party to an action lies in the sound discretion of the court.

While the Supreme Court has held in the case of Doan v. Biteler, 49 O. S., 588, that the action of an administrator to sell real estate is a civil action within the meaning of the code, and therefore the rules of practice of the code apply to such actions, the object and purpose of this kind of an action should not be lost sight of, nor the statute specially applicable thereto, which provides who are necessary parties.

Within the provision of sec. 6142, Rev. Stat., Black is not a necessary party to this action. In Hillier v. Stewart, 26 O. S., 652 (at 658), it is said: "All the parties necessary or proper to a complete determination of the questions involved in the original action were brought in its commencement; and therefore, against the objection of the original parties, it was improper to admit into that case the plaintiffs in error, as defendants, for the purpose of stating by way of cross-petition, a new case which could not be determined without the presence of still other parties, who claimed no interest in the subject-matter of the original action."

If all the matters are gone into as prayed for in the defendant's answer and cross-petition, this court would be compelled to determine a large number of matters foreign to the original action in this case. It

Clark Probate Court.

would need to determine whether or not the account of Chas. H. Neff was proper; whether said Chas. H. Neff was insolvent; whether the assignment of his claim to said Black was valid.

The proper consideration would bring into this case all creditors of Chas. H. Neff; all devisees and creditors of Benj. Neff and creditors of J. Grant Neff. This would add a greater complication to the original action than I think it ought to sustain under the surrounding conditions. *Bartlett v. Patterson*, 9 Ohio Dec. Re., 73 (at p. 79). In discussing sec. 571 of the code as to the defense the defendant may set up the court says: "But that is not the position Strong & Carey take; they say, 'we want to have the court to first find us a lien, and then we want to have it turn around and enforce the lien.' Now I have found nothing in this section of the code broad enough to allow that."

This is quite similar to the position of Black, who wants the court find that he has a lien, and then provide means of enforcing it. The application of Black was not made until long after judgment was rendered and the premises ordered sold. Therefore the language of the court in *Henry v. Jeans*, 48 O. S., 443, is applicable. Here it is said (p. 456), "From this section (5114) may be derived the power, in special cases, to make new parties after judgment, that there may not be a failure of justice. It is a power; however, that will be sparingly exercised and with a cautious discretion."

The answer and cross-petition of Black brings so many new elements into this action not necessary to determine the matter brought forth by the petition, that the exercise of a cautious discretion will hardly justify permitting him to be made a party to this action.

Besides, Black has hardly exercised that degree of diligence which commends itself favorably to a court of equity. Living in the same vicinity, and being acquainted with all the parties, he suffered more than eighteen months to elapse after Chas. H. Neff had filed his final account and J. Quincy Smith as administrator of J. Grant Neff had begun this case, and even two months after the premises were sold at public auction, before he attempted to enforce his alleged rights in the premises.

All things therefore considered, I think the demurrer should be sustained, and if Black desires to further prosecute his action, let him do so in an original action in a court of competent jurisdiction.

Horace Stafford, for plaintiff.

E. H. Kerr, for Black.

NUISANCE—SIDEWALKS—INJUNCTIONS.

[Franklin Common Pleas.]

MCCORMICK HARVESTING MACHINE CO. V. KAUFFMAN-LATTIMER CO.

1. Where the defendant, in loading and unloading goods at its building, has its wagons standing on the sidewalk from three to forty minutes at a time, and from one to two hours each day, and the wagons of its customers an hour each day, thereby preventing pedestrians, during such time, from using the sidewalk and making it necessary for them to walk in an unpaved street: Held, that such acts constitute a public nuisance under sec. 6884, Rev. Stat.
2. Where the plaintiff's place of business is situated near the defendant's building, and plaintiff's customers and tenants use the sidewalk obstructed by defendant; the plaintiff may, under such circumstances, obtain a permanent injunction against the defendant for maintaining such nuisance.

McCormick Machine Co. v. Kauffman-Lattimer Co.

3. Where, by reason of a public nuisance, an individual sustains a special injury he may recover such special damages, whether direct or consequential.
4. Before an individual can maintain an action, either for damages or for an injunction, because of the obstruction of a highway, he must prove some damage peculiar to himself and not suffered in common with the general public.
5. An unlawful use of the sidewalk is not warranted by the facts that the defendant had no other means of getting its goods in and out of its building, other than by means causing a temporary obstruction of the sidewalk, that the sidewalk was not obstructed for a period greater than was required to load and unload wagons, and that it acted in the honest belief that it had the lawful right to so use the sidewalk.
6. The fact that the evidence fails to show that the plaintiff has lost any customers, or business, or tenant, or rent, or the extent of the depreciation of its premises, by reason of the obstruction, is not decisive of the question of the injury suffered by him.
7. The fact that the extent and amount of the injury, or damage, is not susceptible of proof, affords a reason in addition to others, for granting to the plaintiff equitable relief.
8. The mere fact that an ordinance in reference to sidewalks contains certain penal provisions, does not confer any right or privilege upon any person, in respect to other acts not made penal in such ordinance.

EVANS, J.

The defendant is the owner of premises situated at the northwest corner of Front and Chestnut streets, in Columbus, O., having a frontage of 62½ feet on Front street and 187½ feet on Chestnut street. Said premises being covered by the defendant's buildings in which it is engaged in carrying on a wholesale business in drugs, medicines, &c. The plaintiff is the owner of premises fronting on said Chestnut street, and being on the north side thereof and separated from the defendant's said premises by Park street, which is 33 feet wide, and the C. & X. Railroad's right of way. Upon the plaintiff's premises is its business house where it is engaged in handling and selling farm implements, machinery, etc. Chestnut street is a public street of the city, and is 82½ feet wide. In 1891, the defendant, for the purpose of carrying on its said business, purchased its said premises and erected its building thereon which is about 62½ by 187½ feet, and entirely covers its said premises; and at the same time, erected, in Chestnut street, in front of its said building and adjoining the same on the south side thereof, a platform about fourteen feet long, four feet wide and about five feet high at the west end thereof, and about eighteen inches high at the east end. This platform is used by the defendant and other persons having business with it, for loading and unloading wagons, which for that purpose stand from three to forty minutes at a time, and each day the wagons and horses of the defendant, for a period of from one to two hours, and those of its customers, for perhaps about an hour each day, upon that part of the sidewalk that is not covered by the platform. The sidewalk is well paved, but the roadway of the street is not paved and is generally dirty or muddy. While the wagons are thus standing, the horses are turned around parallel with the building to enable pedestrians to pass around over the roadway through the street. The defendant has no access to its premises except from one of said streets across the sidewalk. When the wagons and horses are on the sidewalk pedestrians are compelled to walk around through the roadway of the street. The plaintiff uses its said premises for carrying on its said business, and also has flats and houses thereon which it rents to various tenants who reside therein. The plaintiff's agents, customers and tenants use said sidewalk between plaintiff's premi-

ses and High street, which is the principal business street of the city. The case is now here for final decision upon the pleadings, evidence and briefs.

That the obstruction of the street, as disclosed by the evidence, is a public nuisance, can admit of no question. That it is a plain violation of sec. 6884, Rev. Stat. of Ohio, is apparent; and by sec. 1878, Rev. Stat., it is the duty of the police force to remove it; and by sec. 2640, the duty is enjoined upon the city to keep its streets open and in repair and free from nuisance. *Village of Cardington v. Admr. of Fredericks*, 46 O. S., 44; *Zanesville v. Farman*, 58 O. S., 605.

The term 'nuisance' is of extended application. Many definitions are given, necessarily varied because the word applies to a large number of subjects. "Nuisance," something noxious or offensive. Anything not authorized by law which maketh hurt, inconvenience or damage. It may be (a) private, as where one so uses his property as to damage another's or disturb his quiet enjoyment of it; (b), public, or common, where the whole community is annoyed or inconvenienced by the offensive acts, as where one obstructs a highway, or carries on a trade that fills the air with noxious and offensive fumes. The generally accepted rule is that although the nuisance be a public one, yet it is private also, if an individual sustain a special injury thereby, and he may maintain an action and recover his special damages, whether it be direct or consequential. *Village of Cardington v. Admr. of Fredericks*, *supra*. The rule is well settled that in order to sustain an action by a private person for damages, from an obstruction of a highway, the plaintiff must prove some damage peculiar to himself not suffered in common with the general public. 9 Am. & Eng. Ency. of Law, 414; *Shear & Red. on Neg.* sec. 371; *Farrelly & Co. v. The City of Cincinnati*, 2 Dis., 516, 519, 538-540. *Elliot on Roads*, 474, 496, 500. 10 Ency. of P. & P., 897-901. *Jones on Easements*, secs. 543, 544, 550. Nor will a court of equity restrain the obstruction of a public street upon the petition of private citizens who will suffer no special injury therefrom different in kind from that to be suffered by the whole neighborhood or the public generally. 10 Ency. P. & P., 897-901, and notes 2 *Kinhead's Code Pl.*, sec. 949; *Sargent v. O. & M. Rd.*, 1 *Handy*, 52; *Maxwell's Code Pl.*, 259-261; *High on Inj.*, secs. 745, 762, 769; *Putnam Sup. v. Valentine*, 5 O., 187; *Smith v. Heuston*, 6 O., 101.

As to what circumstances show a special injury which will entitle a private person to maintain an action for damages, or injunction, is a matter about which the decisions are not harmonious.

That the plaintiff sustains a special injury from the obstruction of the sidewalk, sufficiently appears from the evidence. The plaintiff has invested \$60,000 in its premises which are in close proximity to the defendant's. The plaintiff's employees, customers and tenants use the sidewalk in going to and from the plaintiff's premises. They are daily subject to delay and inconvenience by the objection. That such daily obstruction of the sidewalk on a direct line between plaintiff's premises and High street, which is the principal business street of the city, works damage to the plaintiff is a conclusion justified and required by the circumstances, although the evidence fails to show the amount or extent of the damage. The evidence fails to show that the plaintiff has lost any customers or business, or tenant, or rent, or the extent of the depreciation of its premises, by reason of the obstruction, and yet it is difficult if not impossible to escape the conclusion that it has suffered injury,

thereby, and that it will continue to be injured in like manner so long as the obstruction shall continue; and the fact that the extent and amount of the injury, or damage, is not susceptible of proof, affords a reason in addition to others, for granting to the plaintiff equitable relief.

The case of *Calliman et al. v. Gilman*, 107 N. Y., 360, is similar to the case here. In that case both the plaintiff and the defendant were extensive retail and wholesale grocers having stores near each other on the south side of Jersey street in the city of New York; and a large portion of the plaintiff's customers, in order to reach their store, were obliged to pass upon the sidewalk in front of the defendant's store. Goods were taken to and from defendant's store by means of trucks loaded in the street. The trucks were placed in the street adjoining the sidewalk and then a bridge, made of two skids planked over so as to make a plank way three feet wide and fifteen feet long with side pieces three and one-half inches high, was placed over the sidewalk with one end resting upon the stoop of the defendant's store and the other end upon a wooden horse outside of the sidewalk near the truck to be loaded. This bridge was elevated above the sidewalk at the inner end about twelve inches and at the outer end about twenty inches, thus entirely obstructing the sidewalk, and goods were conveyed upon this bridge to and from the store. Persons wishing to pass upon the sidewalk in front of the store, when the bridge was in place, were obliged to step on the stoops and go around that end of the bridge. The bridge was usually removed when not in use; but there was uncontradicted evidence that it was sometimes permitted to remain in position when not in use, for ten or fifteen minutes, and that it sometimes remained in position when in use one hour, one hour and a half and sometimes even two hours; and the court found that the bridge thus remained in position across the sidewalk from four to five hours each business day between the hours of nine o'clock A. M. and five P. M., and that it obstructed the sidewalk the greater part of each business day. (Pp. 368 and 369). On delivering the opinion of the court Earl, J., said: "Such an extensive and continuous use of the sidewalk cannot be justified. It was a practical appropriation by the defendant of the sidewalk in front of his store to his private use in disregard of the public convenience. Even if in some sense such use was necessary to the convenient and profitable transaction of his business, and if the obstruction was no more and even less than that it would be by any other method of doing the business, these circumstances do not justify the obstruction. If the defendant cannot transact his extensive business at that place without thus encroaching upon, obstructing and almost appropriating the sidewalk during the business hours of the day, he must either remove his business to some other place or enlarge his premises so as to accommodate it. That it was unreasonable is too clear for dispute. He might use the bridge to load or unload a single truck, and this he could do at intervals during the day, at no time obstructing the street for any considerable length of time. But there is no authority and no rule of law which would warrant such an obstruction daily for hours, or even one hour continuously. The defendant was, therefore, guilty of a public nuisance. (Page 369.) It is the undoubted law that the plaintiffs could not maintain this action without alleging and providing that they sustained special damage from the nuisance, different from that sustained by the general public; in other words, that the damage they sustained was not common to all the public living or doing business in Jersey street and having occasion

to use the same. The plaintiffs did not demand any damage in their complaint, and none was awarded them by the judgment. They simply demanded an injunction restraining the nuisance, and such was the judgment given to them. The complaint sufficiently alleges the special damages. It sets forth the location of the stores of the parties on the same side of the street, near to each other, the character of the bridge, which when in use by the defendant was only thirty-five feet from plaintiff's store, and the manner and extent of the obstruction upon the sidewalk. From these facts alone, as they are fully set forth, it clearly appears that the plaintiffs suffered damage from the nuisance, which was not common to other persons having occasion to use the street." (Page 370.)

In *Flynn v. Taylor*, decided by the New York court of appeals, October 6, 1891, and reported in 14 L. R. A., 556, damages to a nominal sum were awarded and an injunction granted by the trial court, which judgment the court of appeals affirmed. The case is similar to the one at bar. In that case the plaintiff and the defendant, each carried on business on the same side of Sackett street in Brooklyn. The street was sixty feet wide, and the plaintiff kept a retail liquor store in a building he owned situated about eighty feet west of the defendant's premises. The defendant carried on the business of manufacturing saleratus and other articles of domestic consumption. Years before the action was begun the defendant, with the consent of the city authorities, erected on the sidewalk in front of his factory a platform ninety feet long, two feet ten inches high, and four feet eight inches wide. The defendant used this platform for loading and unloading trucks, which for that purpose stood for several hours each day upon that part of the sidewalk not covered by the platform. The sidewalk and street together with the bridge over the gutter between, were well paved, and on the same level, and there was usually no difficulty in walking around the obstruction on the sidewalk by going out into the street. While the trucks were standing across the sidewalk backed up to the platform for the purpose of receiving or discharging a load, the horses were generally turned around parallel with the building to enable pedestrians to pass over the carriage-way through the street. The defendant had no access to his factory except from said street and across said sidewalk. When the horses and trucks were on the sidewalk, pedestrians were compelled either to climb over the platform or walk around through the street. In the opinion, Vann, Judge, said: "The owner of land abutting upon a public street is permitted to encroach on the primary right of the public to a limited extent and for a temporary purpose, owing to the necessity of the case. Two facts, however, must exist to render the encroachment lawful; (1) the obstruction must be reasonably necessary for the transaction of business; (2) it must not unreasonably interfere with the rights of the public. Any unnecessary or unreasonable use of a street, however, is a public nuisance, and is declared by statute to be a crime against the order and economy of the state. A remedy for the wrong against the public may be found in the indictment of the offender, or in a suit by the proper officer in behalf of the people to compel him to abate the nuisance. The right to maintain the action does not depend on the amount of the special damage, provided the plaintiff suffered some material injury peculiar to himself. We think that in a populous city, whatever unlawfully turns the tide of travel from the sidewalk directly in front of a retail store to the opposite side of the street is presumed to cause special damage to the proprietor of that store, because diversion

of trade inevitably follows diversion of travel. The nature of this case was such that the amount of damages could not be shown, and hence the remedy at law would not only be inadequate, but would lead to a multiplicity of suits. While the defendant was doubtless careful to interfere with the rights of the public no more than was necessary for the convenient transaction of his business with the facilities that he had, still he could not lawfully monopolize the sidewalk for several hours every day."

For other cases arising out of obstruction of highways see *Halsey v. Rapid Transit Co.*, 47 N. J. Eq., 380; *State v. R. R. Co.*, 77 Iowa, 442; *People v. Cunningham*, 1 Denio, 524; *Jochem v. Robinson*, 66 Wis., 638; *Denby v. Willer*, 59 Wis., 241; *Clark v. Fry*, 8 O. S., 358; *White v. Kent*, 11 O. S., 550; *Hickok v. Hine*, 23 O. S., 522, 528; *Esler v. Springfield*, 49 O. S., 82; *Trustees v. Tuttle*, 30 O. S., 62-66; *McEllvaine v. Wood*, 2 Handy, 166; *Farrilly & Co. v. Cincinnati*, 2 Dis., 515; *Zanesville v. Farnan*, 53 O. S., 614, 619; *Branalian v. Hotel Co.*, 39 O. S., 333; *Herrick v. Cleveland*, 4 Ohio Circ. Dec., 684; See also *Elliott on Roads*, 524 and 525; *Jones on Easements*, sec. 551, 546, 543; *Brown v. Manning*, 6 O. S., 298; *Le Clercq v. Trustees*, 7 O. S., 217; 91 *Indiana*, 64; 47 *Me.*, 161; 26 *Minn.*, 10; 69 *Pa. St.*, 59; 106 *Ind.*, 302; 85 *Minn.*, 423; 28 *Kans.*, 726.

Reliance is placed by the defendant on an ordinance of Columbus passed August 17, 1857. Ordinances of 1882, p. 168, which makes it a penal offense for any person to drive or back any horse, or any wagon etc. over or upon any sidewalk or suffer the same to stand thereon, unless it be to cross the same for the purpose of entering some lot or yard, or for the purpose of approaching some building, lot or yard, to deposit therein, or remove therefrom, wood, coal or other material, at the request of the owner or occupant of such building, lot or yard. This ordinance was repealed February 12, 1884. Ordinances of 1896, page 169. This ordinance was in force when the defendant purchased its lot and erected its building thereon, and it is now insisted on behalf of the defendant that this ordinance, under the circumstances, operates to estop the city and the public from disturbing defendant's rights as conferred by said ordinance. This claim is not well founded. The ordinance made certain acts punishable by a fine of from one dollar to ten dollars. The acts made penal by the ordinance are described and distinguished by the ordinance from other acts which are not made penal by the ordinance. The ordinance does not undertake, or attempt, to confer any right or privilege upon any one, or upon any class of persons.

In *Elster v. Springfield*, 49 O. S., 82, Spear, Judge, said (p. 98): "There is no power in the municipality to make a valid grant prejudicial to the interests of the public," and on p. 97, "The municipality is given the exclusive care, supervision and control of the streets. Hand in hand with this power goes a corresponding duty to keep them open, in repair, and free from nuisance. This implies a duty to see that the right of the public therein is not encroached upon. An encroachment which would prevent the reasonable use of the street by the municipality would be a nuisance, and power to validate such nuisance by a grant would be utterly inconsistent with the duty enjoined to keep the street free from nuisance." And in that case it was held that the city did not have power by grant, to give plaintiff any right in the street inconsistent with the future legitimate uses of the street by the city. And that no right by prescription to maintain pipes in the street would vest

in the plaintiff although he had enjoyed the use more than twenty-one years (page 93.) Heddleston, Sup. v. Hendricks, 52 O. S., 460, 467.

In the case at bar the defendant has been careful not to obstruct the sidewalk for any greater period of time than was required to load and unload wagons; and it has used the sidewalk in the honest belief that it had the lawful right to so use it. It has no practical means of getting goods in and out of its building except over and across the sidewalk, either on Chestnut street or Front street. But these considerations do not warrant an unlawful use of the sidewalk. And the manner in which the defendant transacts its business is an inducement to others who thus use the sidewalks to use it in like manner as the defendant, at the defendant's platform, and for which use the defendant must be held responsible.

The conclusion reached is that the plaintiff is entitled to a permanent injunction, and it is therefore ordered and adjudged that the defendant, its agents, servants and employes refrain from unnecessarily or unreasonably obstructing the sidewalk on the north side of Chestnut street in front of the defendant's said premises, being the sidewalk between defendant's premises and the roadway of said Chestnut street, by wagons and horses, or other like obstructions across, or upon the said sidewalk, and reaching from the defendant's said premises, or from its said platform in front of the same, to the roadway of said Chestnut street, or from unnecessarily or unreasonably hindering or preventing the plaintiff or their employes, servants, customers and tenants from having the convenient use of and passage along the said sidewalk of said Chestnut street by any like obstruction; and it is further adjudged that the plaintiff recover its costs herein expended taxed at \$— from the defendant.

DEVISE—JUDGMENT.

[Clark Probate Court.]

J. H. BARKMAN, ADMR. V. GEO. W. HAIN.

1. When, under a devise the legal title vests in the executor, a judgment against the devisee will not constitute a lien on the property devised.
2. A devise providing that the land shall be sold by the executor, gives to him a mere naked power.
3. Where the will provided that the testator's real estate should be sold by the executor twelve years after the death of the testator, and the proceeds divided between his children: Held, that the interest of the children vested at the time of the death of the testator and was subject to a judgment lien, the same as any real estate, and the land being sold by the executor, the lien was transferred to the fund arising from such sale.

ROCKEL, J.

In 1884, Frederick Hain died seized of certain real estate which he disposed of by the following will:

"Item 1st. I give and devise the proceeds of my farm whereon I now live in section 31, town 3, and range 9, in Clark county, Ohio, to my wife Isabella Hain in lieu of her dower and yearly support for the period of twelve years after my decease, she to pay the annual taxes, and keep the fences thereon in good repair.

"Item 2d. It is my will that my said wife shall have the use and occupancy of the dwelling house, stable and garden and about three-fourths acres of ground now occupied by me, during the said period of twelve years for a home for herself and my daughter Caroline.

"Item 3d. It is my will that if my said wife should die before the expiration of said twelve years, my daughter Caroline shall have provision made out of the proceeds of my said farm for her support until the expiration of said twelve years after my decease.

"Item 4th. It is my will that at the end of twelve years after my decease, all my real estate aforesaid, shall be sold by my executor, hereafter named, at public sale, and the proceeds thereof divided in three equal shares, as follows: To my son George Hain, one share; to my daughter Caroline, one share, and to the children of my daughter Elizabeth Ann Snyder, one share.

"Item 5th. I appoint my executor, hereinafter named, as testamentary trustee of my daughter Caroline's estate.

"Item 6th. I give my personal property to my wife.

"Item 7th. It is my will that if my said wife is living at the end of twelve years aforesaid and at the sale of my real estate she shall have one-third of the proceeds of said sale and the two-thirds shall be divided among my children as aforesaid.

"Item 8th. I hereby nominate and appoint my trusted friend and neighbor, John Smith, to be the executor of this my will, hereby revoking all former wills by me made."

It will be observed that by this will the real estate was not to be sold until twelve years after the death of the testator. In the meantime one of the legatees, George W. Hain, suffered some judgments to be taken against him and also endeavored by quit claim deed, to sell his interest in the estate. These matters with the questionable rights existing under them, induced J. H. Barkman, the administrator with the will annexed, to commence an action in this court, to sell said real estate, making such alleged lien holders and purchasers, parties defendant. To this petition R. C. Hoover, one of the defendants, filed an answer and cross-petition in which he alleged that he had a judgment lien on the interest of Geo. W. Hain, and that thereafter said George W. Hain attempted for a colorable consideration, to sell to one Albert Clingman, his interest in said real estate, and that the same was done, to hinder and delay the creditors of the said George W. Hain.

Catherine Hain, one of the defendants, also filed an answer in which she said that she purchased by deed from Albert Clingman, the interest of said George W. Hain. She also at the same time filed a demurrer to the answer and cross-petition of R. C. Hoover. This raised the question whether the interest of Geo. W. Hain in the real estate in question under the will of said Frederick Hain, was such an interest that could be subject to a judgment lien.

Section 5374, Rev. Stat., provides that lands and tenements, including vested interests therein, shall be subject to execution. It will be necessary therefore to determine what kind of an interest Geo. W. Hain had in this real estate.

In the first place, it will be necessary to determine in whom the title vested from the death of the testator until the sale of the lands by the administrator with the will annexed.

For, if the legal title vested in the administrator, it will be admitted by all that no lien could attach. In the American and English Ency.

of Law, vol. 7, page 274, it is said: "In determining whether the executors, under the provisions of the will take a fee simple in trust to sell, or are invested merely with the naked power of disposition, the established distinction appears to be, that a devise of land to executors to sell, passes the interest in it. But a devise that executors shall sell the land, or that land shall be sold by executors, gives them but a naked power."

Applying this distinction, (which I believe is borne out by the Ohio decisions,) to the provisions of the will under consideration, a mere naked power is held by the administrator.

In *Elster v. Fife*, 82 O. S., 358, under a will which directed the land to be sold by executors, and the proceeds paid at a specified time, to certain legatees to whom he bequeathed his whole estate, it is said (p. 368): "The theory upon which the plaintiffs frame their case involves the inquiry as to what became of the legal title to the land in controversy after the death of the testator, from whom both parties claim title. The will makes no disposition of his real estate, other than that it shall be sold by his executors, and that the proceeds shall be paid over by them to a trustee, for the future benefit of his two daughters, who are made legatees of his entire estate. The executors were merely endued with power to sell the real estate and pay the money arising from the sale to the trustee, who was intrusted with the management, and to some extent, disposition of the fund. But the executors acquired no personal interest or special trust in the property, further than that connected with its sale and payment of the proceeds to the trustee named in the will. Subject to this power, the testator, so far as the executors were concerned, left the title as it stood at law, to pass to his heirs, cumbered with equity created in behalf of his legatees.

"The case of *Dabney v. Manning*, 3 O., 321, is directly applicable and decisive of the point. In that case power was given to the executors by the will to sell the land, when, in their opinion, the sale could be made to good advantage, and to pay the proceeds to his children when they became of age. The court said: 'The title certainly descended to the heir while the trust remained unexecuted, subject to be divested by the execution of the power. But the right of possession did not descend with the title; that passed with the will for the better enabling the executors to effect the objects of the testator.' So, in this case, it is equally clear that the title descended to the heirs at law of the testator, subject to the execution of the power conferred by his will. The executors had no title, further than what was connected with the power conferred on them as executors, and, when they ceased to be executors, the power terminated with their office, and any title they had dependent on the power, ended with it."

In the case of *Williams' Lessee v. Leach*, 17 O., 171, it was held that the title was in the executor, but this was because it was the intention of the testator to vest the property in the executor, and within the distinction laid down in the *Am. and Eng. Ency. of Law*, the realty was devised to the executors to be sold. And in *Boyd v. Ialbert*, 12 O., 212, it was held that the will gave more than a naked power, and for that reason the title vested in the executor.

In other states the decision in *Marsh v. Wheeler*, 2 Edw. Ch., (N. Y.) page 156, is pertinent as showing where the legal title vests in case under a will. In this case D. N., by his will, disposed of the residue of his estate as follows: "I will, order and direct all the rest, residue and

remainder of my estate to be sold after the expiration of one year from my decease, and I hereby authorize and empower my executor to convey said rest and residue of my estate accordingly. And as to the said residue of my personal estate, and the proceeds of the sale of said rest, residue and remainder of my real estate, I give, devise and bequeath the same as follows :

"To each of my said daughters, (naming them) the sum of five hundred dollars, and the residue thereof to my sons, (naming them) to be equally divided between them share and share alike." In passing upon this case the vice chancellor used this language: "The real estate is not devised to the executors, nor was the legal title vested in them by operation of law, and not being expressly devised to any one, it descended in the heirs at law, subject to the power of sale conferred upon the executor. The power here given is a general one in trust, and is operative upon the grantees of the power. It operates as an incumbrance, and when it is executed, the same overreaches and divests the legal title and the estate in the heirs. The power could not be executed until after the expiration of one year from the testator's death; but the moment it was executed, the legal title became in the purchaser, and the purchase money became assets in the hands of the executors like the proceeds of the personal estate, and for the same general purpose."

This doctrine was further recognized in *Holt v. Lamb*, 17 O. S., 374, in which it is held: "Where land is devised to a tenant for life with directions that at his death it be sold, and the proceeds divided among his children, the children may elect at his death to take the land itself, or to have it sold for their benefit."

In *Horst v. Dague*, 34 O. S., 371, a testator provided that his real estate should be sold by his executors and the proceeds divided among his eight children. Before the execution of the power of sale, vested in the executor, by the will, one of the legatees gave a mortgage on his interest. After the mortgage was executed, a judgment was rendered against the legatee, and it was sought to give this subsequent judgment priority over the mortgage on the ground that the legatee's interest was one in personal property, and not in real estate.

In deciding the case, the court directs attention to the fact that the judgment was acquired subsequent to the execution of the mortgage. It is also important in holding that, until the power of sale vested in the executor was exercised, the legatee's interest was real estate as distinguished from personal property.

On page 376, it is said: "The intention of the parties is sufficiently apparent. The legal title to the property mortgaged, at the date of the mortgage, was in Simon Rohrer (the legatee under the will). It was, therefore, quite neutral to regard his interest as consisting of real, as distinguished from personal estate, although there was an unexecuted power of sale outstanding, the execution of which would divest his title, and pass it to the purchaser under the sale made by the executor. But whether the thing mortgaged was called land or money, or however it was described, is quite immaterial in a court of equity, where the substance and not the form of the transaction is regarded. The mortgagor intended his mortgage to cover his interest in the property, whether classed as real or personal estate. The mortgage, therefore, operated as an equitable assignment of Simon Rohrer's interest in the proceeds of the sale of the real estate, as security for the payment of the mortgage debt.

"This being the substance, and within the contemplation of the parties, the essential character of the transaction, equity will carry the same into effect.

"Simon Rohrer neither questions its character, nor disputes its validity. Nor could he do so successfully if he were so inclined.

"And as the defendant Dague had no lien upon the fund sought to be reached when the mortgage was executed, his rights at most are no better or higher than those of Simon Rohrer."

An inference might be gathered from this opinion that if the judgment of Dague would have been rendered before the execution of the mortgage, that his lien or claim upon the fund would have been superior to that of the mortgage creditor. And if so, would have been decisive of the case under consideration.

In *Smith v. Anderson*, 31 Ohio St., 144, a creditor attached the interest of a devisee in lands under a will, giving an executor the power to sell and divide the proceeds. After the attachment was made, the executor sold the land, which the court held he had a right to do, free from the claim of the attaching creditor.

Whether a lien on the fund was created, is suggested, but not decided. On page 146 it is said: "The position assumed by counsel for plaintiff is, that the executor having but a naked power of sale, the legal title to the land of which the testator died seized vested and took effect in the devisees under the will; and that inasmuch as the statute, upon the proper showing, authorizes the attachment of whatever interest a debtor may have or own in any property not exempt from execution, the lien acquired by the levy of the attachment in the action against William Anderson, was not defeated by the subsequent sale of the estate by the executor.

"Granting that the devisees took the legal title, they received it subject to an outstanding power of sale in the executor, the execution of which would at once divest them of their title and pass it to the purchaser.

"The instrument creating their estate, lodged in the executor power to dispose of the fee. Without an election to take the land instead of the proceeds to be derived from its sale, no incumbrance the devisees might see fit to place upon it would affect, much less defeat, the right and power of the executor to convey away the title.

"The lien of a judgment against a devisee could operate no further than to bind the interest received. It could not impair the right of the executor to convey the premises in execution of the power conferred by the testator. A creditor by seizing the property of his debtor by process of law ordinarily acquires no greater interest than his debtor possesses. This is the general rule.

"The estate the devisees took by the bequest was not an absolute estate in the full sense of that term. One of the principal incidents of ownership, the power to sell and convey, was vested in another. Upon the execution of such power, the title of the devisees became, *ipso facto*, extinguished, and the funds raising from the sale became a substitute for the land conveyed. If the estate had been disposed of by the will; if the decedent had merely clothed his executor with a power to sell and convey, leaving the distribution of the estate to the law of descents, and the attachment had been levied on the interest of William Anderson, descended to him as heir, before the power of sale had been executed, the case, in its legal aspect, would not be changed. In such case, the

legal title would have gone to the heirs subject to the power in the executor to divest it, by a sale and conveyance of the estate to which the power attached. And a seizure of the interest of the heir, by levy of execution or attachment, would have no possible effect on the executor's right to convey. *Allison v. Wilson's Executors*, 13 Serg & Rawle, 330; 4 Har. (Del.) 348.

"Whether the attachment in the present case gave or created an equity in the fund arising from the sale by the executor, is a question not before us. It is, however, claimed that where a mere power of sale is given to an executor, trustee, or where he is imperatively directed to sell, and to distribute the avails of the sale among ascertained beneficiaries, they may defeat the right to execute the power, or extinguish it by electing to take the land instead of the proceeds arising from the sale. *Holt v. Lamb*, 17 Ohio St., 375. *Ree v. Underhill*, 12 Barb., 113; 1 *Leading Cases in Eq.* pt. 11, 1168. Admitting the law to be as thus claimed, it does not affect the case under discussion. Here there was no election declared. It is the election, and not the mere right to make it, that changes the character of the estate. 1 *Story's Eq. Jur.*, section 793."

The opinion just quoted seems to go on the theory that the devisee had an interest under the will which might have been subjected to a judgment lien. The recent case of *Moore v. Herancourt*, 6 Circ. Dec., 826, is important as holding that where the title vests in a person, the existence of a power in another to divest him of that title will not prevent a lien from attaching, and while not necessary to the decision of the case, the judge in the opinion says, that the lien will be transferred from the lien to the fund. On page 423, it is said: "It is the claim of the plaintiff that the interest in the real estate devised by the will of Mr. Herancourt was a vested interest, and consequently that on the rendition of the judgment in favor of *Moore v. E. S. Herancourt*, it became a lien on all of his interest in the real estate devised to him by his father.

"We are of the opinion that the interest so devised was a vested interest; but it seems clear to us that any interest he may have taken in the matter was subjected to be divested either by the exercise of the power to sell said real estate which was conferred by the will upon *Barbara Herancourt* or on the contingency that in the event of the death of any one of the devisees, without issue of his body, then his or her share should go to the surviving legatees or devisees.

"That such was the case in the event that the widow should exercise the power of sale given to her, and that even when a judgment had been recovered against one of the devisees, prior to the conveyance by her, that the interest of the devisee would be conveyed free of the judgment lien, we think is held in *Smith v. Anderson*, 31 Ohio St., 144, and in such case the interest of the devisee would be in the proceeds of the sale. The obtaining of the judgment could in no way interfere."

As to how such lien may be protected or enforced, the suggestions on page 426 are pertinent to the question under consideration. Here it is said: "We suppose, then, that while it may be within the power of the court in a case of this kind, to order the sale of whatever interest *Herancourt* may have in this land, subject to the life estate of his mother, her power to sell the same, and to the advancements already made to him, and to the contingency of his having only a life estate therein, yet it would seem a vain and useless thing to do in this case, as it is not likely that any one would purchase so uncertain an interest. Or we sup-

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pose this court might by its decree, place the plaintiff, in so far as this judgment is concerned, in the shoes of Herancourt, and by decree provide that on the final settlement, of the estate, and the ascertaining of the amount that would be coming to Herancourt, that it should not be paid to him, but that the income thereon, for his life, be paid to the plaintiff on account of his judgment, and if on his death, it appears that Herancourt was the absolute owner of such share, that so much thereof as may be necessary, be applied to the satisfaction of such judgment.

"We express this view for the information of counsel, without knowing the amount of the estate, or whether any such relief would be deemed of any value."

These decisions are sufficient to warrant me in holding that the interest of George Hain, under the will of his father, vested at the time of the death of his father, and that such interest was subject to a judgment lien same as any real estate. If the executor exercised the power vested in him under the will and sold the real estate, the lien would be transferred to the fund from such sale.

It is admitted that the judgment is not dormant, and that the execution has been issued and levy made.

It will therefore be held that the judgment lien is valid, and an order will be made directing the executor to apply the proceeds in his hands belonging to Geo. W. Hain, upon the judgment, and the remainder to the person to whom it has been conveyed by said Hain.

J. A. Kerr, for Hain.

Oscar T. Martin, for Hoover.

CONDEMNATION.

[Clark Probate Court.]

OHIO SOUTHERN RAILROAD CO. V. J. AND D. SNYDER.

1. When property is condemned by a corporation the compensation allowed should be the market value at the date of the appropriation.
2. The market value is the price which the article will bring when offered for sale in the market, being the highest price which those having the occasion and ability to buy are willing to pay.
3. The fact that owner's financial situation is such that a fair sale would be of great benefit to him, or that plaintiff is so situated that it must have this property should not be considered.
4. The market value is to be ascertained from sales of similar property in the same tract or of property having substantially the same surroundings and conditions, upon which the opinion of witnesses must be based.
5. Where land because of its awkward shape and surroundings has no actual market value, considered as a separate and independent tract, the value will be considered the same as an equal area of the adjoining land.
6. Only lands can be considered as remaining lands to which damage may be allowed which adjoin and in their use and enjoyment are connected with the lands sought to be appropriated.
7. Whatever of actual and not remote and speculative injury is caused by the building and operation of a railway through defendants' lands, to them as owners of such lands and not in common with the public at large, should be considered in estimating how much less valuable the remaining portions of their lands will be.

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7. The provisions of the statutes by which the railroad company is obliged to maintain crossings, fences, drains, etc., for the benefit of the owner are to be considered.
9. If the railroad violates any duty to adjoining landowners or increases burdens by using lands for a different purpose than that for which they were appropriated, the law provides a remedy in damages, and such violations of duty are not to be anticipated.
10. Compensation means the sum of money which will compensate the owner for the land actually taken or appropriated. "Damages" is an allowance made for any injury which may result to the remaining land, by reason of the construction of the proposed railroad after making all due allowance for benefits.
11. Any local benefit arising from the construction of the railroad which is connected or blended with any damages caused to the lands may be considered to reduce the damage connected with it.
12. Damages arising from furnishing tramps access to the lands of the defendant through the right of way are too speculative.
13. What use lands are now put to and what use they might be put to at the present time are to be considered but not what use they may be put to in the future because of the increased facilities for travel or transportation or the growth of towns, though if a new use is conferred upon the remaining lands by the building and operation of the railroad, specially applicable to such lands alone, which adds to or increases their market value this should be considered.
14. Where the highway is taken for a railroad the abutting owners are entitled to damages for inconveniences which result to them in the use of their lands but not for such inconveniences as are suffered by the traveling public in general.
15. When the construction of a bridge or other outlet for ditches or drains is not inconsistent with the proper construction and operation of the railroad, it is to be presumed that they will be constructed, and the only injury for which the defendant can recover damages is the possibility of trouble and a law suit to enforce his rights, but where the building of such bridge or outlet would be inconsistent with a proper construction and operation of the railroad, damages for interfering with the drains and ditches may be awarded.
16. If, excluding inconvenience to defendants suffered by public at large, the benefits derived from the building of the railway will outweigh the detriments so that the market value of the land is not diminished, they are entitled to no compensation for damages to the remaining land, but only for land actually taken.
17. It is competent for witnesses to testify as to all the different ways in which injury may result to the defendants from the building of the railroad, but not as to the amount of damages which would compensate for such injuries.
18. The burden of proof in appropriation cases is upon defendant to prove the injury for which he asks damages by a fair preponderance of the evidence.
19. In arriving at a decision the jury should consider not only the evidence in the case but also their knowledge gained by experience and a view of the premises, and of the former is a matter of opinion and does not conform to the latter it may be disregarded.

CHARGE TO THE JURY.

GENTLEMEN OF THE JURY: First. By your oaths administered to you in the case before you, in arriving at your verdict you are required first to assess, according to your best judgment, the amount of compensation due the property owners. the defendants herein, for the property sought to be appropriated by the Ohio Southern railroad in these proceedings, which is a strip from sixty-six to seventy-six feet wide through their lands, and the land for a Y switch, irrespective of any benefits that may result to such owners by reason of the building and operating of the proposed railroad.

It is no matter, if in your opinion the remaining portion of the owner's property would be enhanced in value by the reason of the build-

ing of this railroad, in an equal or greater sum than the value of the land appropriated, yet the owners are entitled to receive from the railroad company the fair market value of the property so appropriated.

a. This market value is to be fixed at the time the property is appropriated, and in this case, that is the present time; and this price or value is not to be increased upon the necessity of the plaintiff on the one hand, to have this property, nor on the other, diminished from the necessity of the owners to dispose of it.

b. The market value is the selling value.

It is the price which an article will bring when offered for sale in the market.

It is the highest price which those having the ability and occasion to buy are willing to pay. The owner, in parting with his property to the railroad company, is entitled to receive as compensation just such an amount as he could obtain if he were to go upon the market and offer the property for sale. I do not mean the price he would realize at forced sale upon short notice, but the price he could obtain after a reasonable time and notice, such as would ordinarily be taken by an owner to make a sale.

Market value is not what a piece of property can be bought at by taking advantage of the necessities of the seller, nor by bringing the property to sale under foreclosure. Such situations have a tendency to diminish the value of the property. Nor on the other hand is it fair to make as a standard of value the case where the buyer may be compelled to take the property by reason of some unusual surroundings or circumstances.

Sales which fix a market value imply a buyer and seller both of whom are free to act, and neither of whom act under any compulsion or pressure of circumstances.

c. The fact that the owner may be so situated financially or otherwise that a fair sale would be of great advantage to him, or that the railroad company is so situated in order to properly locate and build its line of road or otherwise that it must have this property, should not be considered by you in any manner whatever.

The market value of the real estate must as a general rule be ascertained from sales either of property out of the same tract, sought to be appropriated, or of property in the immediate vicinity having substantially the same surroundings and the same conditions.

d. Witnesses called to prove these matters are first qualified by showing that they have a general knowledge of the tract sought to be appropriated, the relation it sustains as to its value, whether equal or greater to the surrounding lands, which have recently been sold at their market value. This having been shown, the witness may be asked his opinion as to the value of the land sought to be appropriated, and on cross-examination he may be required to state upon what he bases his opinion, so that you, the jury, may know what weight to attach to his opinion.

Likewise, persons dealing in real estate in the neighborhood or living in the vicinity may give their opinion as to the value of the tract sought to be appropriated, and on cross-examination it may be shown to you upon what they ground their opinions, so that you may know what weight to give to them in forming your verdict.

The value of their opinions depend upon their experience, their knowledge, their opportunities for knowing and forming an opinion, and

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on their honesty, fairness and good judgment. You are not to put the value any higher than its fair market value, because the owner fixes a sentimental value on it; nor because he has lived on the land a long time and is attached to it.

e. The land sought to be appropriated in such a proceeding as this, may, by reason of its awkward oblong shape, surroundings and the limited uses to which it be applied, and from the fact that buyers or sellers of such a tract, or tracts, are so very limited, be such that it can hardly be said to have a general market value if considered as a separate and independent tract. Sellers at a fair market value there might be none; purchasers none but railroad corporations. If such be the case, and the lands sought to be appropriated have no general market value, in ascertaining the amount of compensation that should be allowed the owner it would be proper to consider the market value of the lands immediately adjoining, and if the land appropriated be of the same quality, capacity and character as such adjoining lands it would have the same market value: or if the land appropriated be of the same average quality, capacity and character of that of the entire tract of which it is a part, it will have the same market value per acre the entire tract has, and should be so considered in allowing compensation to the owner.

To this should be added or subtracted, as the case might be, the difference of value, per acre, if any, resulting alone from the fact that one is a large and the other a small body of land. But the mere fact that the land appropriated is a small tract or narrow strip in or through the defendants' land neither adds to nor detracts from the amount to be allowed defendants as compensation therefor.

f. If the land sought to be appropriated has no general market value, and the value cannot be determined from that of the adjoining or neighboring lands, then its value can only be ascertained from the land itself, which is in evidence in this case, and from witnesses whose skill and experience enable them to testify directly to such value in view of the hazards and chances and the business to which the land is devoted. The second matter which by your oath you are required to do, is to determine according to your best judgment how much less valuable the remaining portion of the defendants' property will be worth by reason of this appropriation and the building and operation of the proposed railroad. In this case the defendants, John and David L. Snyder, are the joint owners of large bodies of land near to and adjoining this appropriation. It therefore becomes important to know what lands are to be included as remaining lands, to which lands, if injuries result from the building and operation of this railroad and the appropriation, damages may be allowed these defendants.

The plaintiff in its petition describes the land sought to be appropriated in five different tracts. The defendants, by maps and evidence introduced, claim that there are but two different tracts. You are not bound to accept either. Tracts two and three, in the petition described, are a continuous line of the road through one continuous body of land of 595 acres herein usually referred to as the "lower farm." But the mere fact that it is contiguous will not alone entitle it all to be considered as remaining lands to tracts two and three. But the manner in which the owners use it largely determines this fact. If they use it as one farm, as one entire tract, in their enjoyment of it, then all should be considered as remaining lands to the lands appropriated in tracts two and three in the petition described. If some part however, is a part of

another farm, not used in connection with the lands sought to be appropriated, such part should not be considered.

Tracts four, five and six, in the petition described, are parts of a connected tract of some four hundred and twenty acres of land, in this case usually referred to as the "upper farm" and not adjoining the 595 acres before mentioned. While the land is connected, the tracts four, five and six do not form a continuous line of the railroad, tract four being separated from five and six by the lands of others.

Here the same rule is to be applied as to the 595 acre tract.

If this is all used as one entire tract, as one farm, then it should be so considered, and would all be remaining land within the meaning of the statute. But if tracts 4, 5 and 6, one or each, are parts of separate and distinct tracts, or farms, then each should be considered separately and distinctly.

Only lands can be considered as remaining lands to which damage may be allowed which adjoin and, in their use and enjoyment, are connected with the lands sought to be appropriated. And if any part of the 420 acre tract is a part or the whole of another farm belonging to these defendants, not used or connected with the lands sought to be appropriated, such farm or part of farm should not be considered in your estimate of damages to the defendants herein for injuries resulting to their remaining lands.

b. The damage to the remaining lands may be shown by similar evidence and under like rules as that produced or competent to show the value of the lands appropriated. In considering this question, it will be competent for you to consider the fact whether or not fields, either for grazing or agricultural purposes, are divided into irregular or inconvenient parcels, whether more or costlier fencing will be required, bearing in mind, however, that by law, the railroad company must fence (c.) and keep fenced its own tracts: What inconvenience from having the farms divided in several parcels, detached from each other by the railroad, may result to the owners of such farms: Whether the ingress or egress from the fields or detached tracts or remaining lands will be injuriously affected or destroyed, taking into consideration that by law the railroad must construct and maintain proper crossings; whether any part is cut off from water; whether the railroad bed is a dangerous embankment or an injurious excavation; whether additional overflow will be caused or drainage interfered with.

Assuming that the railroad company will construct necessary and proper culverts, and that in bridging streams it will make waterways of sufficient capacity and so place the piers and abutments as not to do injury to the adjacent lands.

Whether the delendants' remaining lands will be diminished in value, and if so how much, by danger from fire to the buildings, fences or crops thereon, or that stock may be killed; taking into consideration the fact that these injuries usually occur by reason of the use of defective machinery, or the negligent construction and maintenance of the fencing along its tract, or the improper conduct of its servants in the operation of the railroad and the management of its trains, and that for such injuries or losses the company is liable, and that the person sustaining the same may in an action against the railroad company receive the full amount of his losses. But the owner is not entitled to damage from fire to buildings unless the danger be such as is imminent and appreciable.

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In short, whatever of actual, not remote and purely speculative, injury is caused by the building and operation of this railroad, through the defendants' lands, to them as owners of such lands and not in common with the public at large, should be considered by you in estimating what damage, or how much less valuable the remaining portions of their lands will be worth by reason of this appropriation.

d. The legislature of Ohio has by statute provided that the railroad must properly construct and maintain fencing along its track: That upon the application of the owner where he owns more than 15 acres of land, which applies in this case, the railroads must construct crossings: that there shall be kept up and maintained along its road bed proper ditches, etc., drains to conduct to some proper outlet the water which accumulates along the sides of such roads.

That during the construction of the road proper crossings shall be provided and fences built and stock etc., protected.

For a violation of these statutory enactments an action at law lies, and recovery may be had against the company for the damages sustained, and should be considered by you in determining how much less valuable, if any, the remaining lands will be worth with the appropriation thereon than they are without.

e. In the use and occupation of the land appropriated the railroad will, in addition to the statutory enactments above herein referred to, be subject to and controlled by the law applicable to the adjoining land-owners, and if it violates any duty thus placed upon it, full recovery may be had against it for all damages occasioned.

Likewise, if a new and different use of the lands appropriated should be made by the railroad, which would result injuriously to the land owner, or a damage should occur from some act or cause, not contemplated in the appropriation, an action would lie, and the full amount of damages sustained could be recovered.

ee. In estimating the depreciation of the adjoining land of the proposed right of way, you are not to consider any damages which result from the improper construction of the road, as it must be presumed that the road will be built in the most approved manner, and skillfully and properly operated.

In these appropriation proceedings the terms "compensation" and "damages" have different and distinct meanings.

Compensation means the sum of money which will compensate the owner for the land actually taken or appropriated. That is, it is the market value of the land taken, irrespective of any benefits that may result to the remaining lands by reason of the construction of the proposed railroad.

"Damages" is an allowance made for any injury that may result to the remaining lands by reason of the construction of the proposed railroad, after making all due allowances for benefits, etc., resulting thereto. In estimating how much less valuable the residue of the property is by reason of the appropriation, you are not to take into consideration remote and purely speculative damages. But the actual injury which the land sustains must be the basis.

g. If you find from the evidence that there is any local benefit arising from the construction of the railroad, and this benefit is connected with or blended with any damages caused to the lands, the benefits and damages arising out of the same lands, then the benefits may be considered to reduce the damages that may be connected with it.

If some parts of the defendants' lands are affected injuriously and other parts beneficially, by what are known as special benefits, both or all should be considered, and the amount which the injuries or damages exceeds the benefits, would be the proper sum to award to the respective landowners as their damages herein.

h. Likewise: When a local incidental benefit to the residue of land, is blended or connected, either in locality or subject-matter, with local incidental injury to such residue of the land, the benefit may be considered in fixing the compensation to be paid the owner, not by way of deduction from compensation, but of showing the extent of the injury done the value of the residue of the land.

i. You should not consider as an element of damages to the remaining lands, any claim based upon the said right of way, affording tramps access to the premises of the defendants' lands. Such damages are remote and speculative, and beyond any probability of ascertainment known to the law.

j. In considering what compensation shall be made the defendants, for damages to their remaining lands, on the farm or upper farm, you should consider the uses such lands are now put to, and also such reasonable use that such lands could be advantageously put to at or about the present time, or the immediate future.

You should not consider remote or speculative benefits that may be conferred on said lands by the building of said proposed railroad. Such as that some parts of said land may, at some time, be needed for stock yards, elevators, etc; neither are you to consider benefits of a general nature, such as a supposed enhancement of the value of the remaining lands by increased facilities for travel or transportation, or the growth of towns. But if a new use is conferred upon the remaining lands by the building and operation of the proposed railroad, specially applicable to such lands alone, be it for the purpose of stock yards, elevators, manufacturing establishments, a mill or a stone quarry, and such new use adds to or increases the market value of such remaining lands, such is a special beneficial use, and should be considered by you in determining how much less valuable such lands are worth by reason of such appropriation.

k. As owners of the property abutting on the Bechtle road, the defendants have a special property in such road, and are therefore entitled to full compensation for the land therein appropriated, belonging to them, subject to the easement of said road, and in addition thereto for any injury to the value of their said remaining lands which may be caused by the building of the proposed railroad on said road at the Bechtle bridge. But the injury must be such as specially applies to them in the use of their said lands, and not such as is suffered by them in the use of such road in common with the public at large.

Thus the inconvenience and annoyance caused them by crossing the railroad at said bridge on said highway in going to and fro from the said lands to the city of Springfield will not be an injury for which damage can be allowed them. But such inconveniences as result to them in the use of their lands, in getting access thereto, or from going from one adjoining tract to another, is an injury for which damages may be allowed.

l. And you may assume in considering what compensation shall be made the defendants for damages to their remaining lands, on the upper farm or the lower either, that when a blind, tile or open ditch or ditches

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now cross or lead to the lands of the railroad company herein sought to be appropriated, that the railroad company will by culverts, bridges or otherwise provide a proper passage-way or outlet for the water collecting and accustomed to flow in and through such blind, tile or open ditch or ditches, unless you find that the construction of such culverts, bridges, or other proper outlet is inconsistent with the proper construction and operation of such railroad. If you find that the proper construction of the railroad requires that no such bridge, culvert, or other proper outlet be made for such ditch or ditches, then there may result an injury therefrom to these lands of the defendant for which damage should be allowed.

If such bridge, culvert or other proper passage-way or outlet should in the proper construction of the railroad be made, having regard both to the efficiency of the work, on the one hand, and the rights of the landowner on the other, you must assume it will be made, and if the same be not made, and damages result to the defendant therefrom, an action of law will lie therefor, and the full amount of damages sustained recovered.

And the only damages that could be allowed to defendants therefor, would be the amount that the possibility of having a difficulty or law suit with the railroad would depreciate the value of such lands.

If you find that the special benefits to the lands of defendants, arising from the building and operating of the railroad in a legal and proper manner, will be equal to or more than equal to the injury arising therefrom: that is, if the remaining lands would bring as much or more in the market—have an equal market value after the construction of the proposed road, or with the appropriation, as before, excluding benefits of a general nature; you should of course allow the defendants nothing by the way of damages, but still allow them the market value of the land actually taken. Injuries or inconveniences resulting to these defendants from this appropriation and the construction of the proposed railroad, in common with the public at large, with the people in general in the neighborhood, or those who have occasion to be in that vicinity, are not matters for which the defendants are entitled to damages.

Neither are the inconveniences of crossing and re-crossing the railroad on the public highway, which are shared by the public generally—those who use the highway in a general manner, to be considered. But only those injuries or inconveniences as especially apply to them in the use of their lands for the use and purposes for which they are adapted are a proper subject for damages.

Only such are to be considered which they suffer as owners of these lands through which the appropriation is made, and by reason of being such owners.

It was proper that witnesses were permitted to testify as to the various matters which would result injuriously or beneficially to these defendants' lands, from the building and operating of this railroad in a legal and proper manner as proposed. But they were not permitted to testify or give their opinion as to the amount of these damages or benefits.

These are matters for the jury to determine.

You are to decide how much less valuable the remaining portion of their property is worth with this appropriation made as well as the value of the land actually taken or appropriated.

You are the sole judges of what weight is to be given to the testimony of the various persons who have testified in this case; when the same is in conflict, it is your duty to reconcile it so far as possible.

In weighing the testimony of the witness, you are to consider the bearing of the witness on the stand, their evident bias or prejudice one way or the other, and you are not to take the average testimony of the witnesses in making up your verdict; this is not the true rule to ascertain the matters for your determination. But you are to weigh the evidence of each witness carefully, and decide from his credibility and from your view of the premises what the verdict will be.

Neither should you by any means of chance determine the amount of your verdict, but let it be a calm and deliberate conclusion, to arrive at which, you have exercised thought and reason, and have given just weight and fair consideration to all the evidence before you.

The burden of proof rests with the defendants, and your verdict should be sustained by a fair preponderance of the evidence.

You were ordered to view the land sought to be appropriated in this case. This was for the purpose of enabling you better to determine the questions before you, and to apply your own judgment in regard to them, as well as to better understand the evidence. And if any one of you know of any fact of his own knowledge, not common to all, bearing upon the case, he ought to disclose it, and testify to it in open court.

In arriving at your conclusions, however, you should take counsel of your own experience and knowledge of like subjects, and should not only consider what the witnesses have testified to, but what you have seen in the view. And if witnesses have testified to matter of opinion which you in the exercise of your judgment and sense do not believe, such testimony may be disregarded.

In making up your verdict you are to consider both the facts appearing to you from the view of the land sought to be appropriated, and the evidence adduced.

In considering all the questions before you in this cause, I trust it is needless for me to add that neither sympathy nor prejudice should have any part in your deliberations or in the formation of your conclusions. The fact that the plaintiff is a corporation seeking to appropriate the property by the consent or against the will of the owner, or that the defendant is a resisting landowner, entitles neither part to credit or favor.

Before the law and before you, plaintiff and defendants stand on a plane of perfect equality.

The power to take private property for public uses belongs to every civilized government. The defendants and all their predecessors in the ownership of these lands have held it subject to the exercise of this right: so it was purchased from the government. And the government may exercise the right itself, or delegate it to another. It has by legislative enactment and judicial sanction declared that the using of property for the building of a railroad is a public use, and has delegated its right to appropriate the defendants' property herein, to the plaintiff.

The plaintiff therefore is simply seeking to enforce a right as well founded as that of the ownership of the property itself.

It is, however, proclaimed by the organic law of our commonwealth that if the government, by itself, or through one to whom this power has been properly delegated, exercises its right to appropriate the property of another, the owner must receive full compensation. It says to

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the plaintiff herein: "You may take the defendants' property, but you must fully compensate them."

And this is your sole province in this case.

You should allow the defendants such sum as will financially fully compensate them for their property taken or injured.

Nothing more, nothing less.

BUILDING AND LOAN ASSOCIATIONS.

[Shelby Common Pleas.]

PEOPLES SAVINGS AND LOAN ASSOCIATION V. ROBERTS ET AL.

1. Since the amendment of sec. 3833, Rev. Stat., by the act of May 1, 1891, a building and loan association, where its constitution and by-laws contain ample authority, may charge a member any sum as a premium for a loan, without the sum so charged having been bid by the member as a premium for such loan.
2. The fixing of such premiums by the association, which together with the assessments and interest agreed upon would make the interest exceed the legal rate, does not make the contract void for usury, because of provision of statute.

RICHIE, J.

This action was brought by the plaintiff against Henry C. Roberts and his wife, and others, for the foreclosure of a mortgage executed by Roberts and wife to the plaintiff upon real estate in the petition described, to secure a loan by plaintiff to Henry C. Roberts, of \$3,500 made on January 22, 1895, payable in monthly installments for a period of one hundred and twenty months, of \$43.75 each.

The defendant, Henry C. Roberts, filed his answer to said petition in which he admits the loan to him, the execution of the bond and mortgage described in plaintiff's petition, and sets out the payments made by him upon the same. He also attaches to his answer the provisions of the constitution and by-laws of the plaintiff association, which confer the authority to make such loan.

In his answer Roberts avers that said loan was usurious in this: that it charged as interest and premium a sum which is in excess of the interest allowed by the laws of Ohio; and that such loan was usurious for the reason that "no premium was ever bid for or in connection with the procuring of said loan."

The provisions of the constitution and by-laws attached to the answer, are, by express averment, made a part thereof; and in argument they are by counsel for both plaintiff and defendant conceded to be parts of said answer.

Section 27 of the by-laws which provides for monthly loans and installments due thereon contains this provision: "Said installments on such loan shall include the interest and premium that might otherwise be bid by the borrower," etc., etc.

Upon a copy of the bond set out in the answer is a table denominated "Redemption Table" upon the basis of a loan of \$1,000, showing the amount of each payment applied, first to "interest and premium," second, the credit on principal, third, the total credit on principal after each payment is so applied, and fourth, the balance due on principal after each payment is made, for the entire period of one hundred and

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twenty months Below this table is a stipulation signed by the defendant, Henry C. Roberts, the first provision of which is "It is hereby agreed that the several monthly installments by which this loan is to be paid shall be apportioned to principal, interest and premium as shown in above table."

The answer asks that an account be taken of the amount due, the usurious contract set aside, and he be charged with interest upon the loan at six per cent. per annum, after deducting the payments made.

To his answer the plaintiff has interposed a general demurrer.

The contention of the defendant is that the plaintiff could not, under the statutes, although the constitution and by-laws of the corporation contain ample authority, charge against the defendant any sum as premium unless the sum so charged had been bid by the defendant as a premium for such loan, and cites in support of his contention, *Ohio v. Greenville, etc., Assn.*, 29 O. S., 92; *Ohio v. Oberlin B. & L. Assn.*, 35 O. S., 258, and *Bates v. Peoples etc., Assn.*, 42 O. S., 655.

The contention of the plaintiff is that the decision of the Supreme Court in the cases relied upon by the defendant, involved a construction of a statute so widely different from the provisions of the statute in force at the time that this loan was made as to make those decisions inapplicable to the case at bar.

The original statute passed May 5, 1868, 65 O. L., 65; 173 S. & S., 194, being sec. 3833, Rev. Stat., 1880, provides that such a corporation "may levy, assess and collect from its members such sums of money, by rates of stated dues, fines, and interest on loans advanced, and premiums bid by members or depositors for the right of precedence in taking loans as the corporation, by its by-laws shall provide." This statute remained in force until the amendment of May 8, 1886, by which it was provided that such corporation "may levy, assess and collect from its members such sums of money, by rates of stated dues, fines, interest and premiums on loans or may otherwise raise money, as the corporation by its constitution and by-laws shall provide." 83 O. L., 116.

This amendment retained the following provision contained in the original statute: "But the dues, fines, and premiums so paid by its members or depositors, although in addition to the legal rate of interest on loans taken by it, shall not be construed to make the loans so taken usurious."

By the amendment of this statute of May 1, 1891, 88 O. L., 469, *Bates Rev. Stat.*, 1897. (3836-3), under the sub-head of "Powers," the corporation is authorized "to assess and collect from members and depositors such dues, fines, interest and premium on loans made, or other assessments, as may be provided for in the constitution and by-laws." And in lieu of the saving clause against usury the provision is "Such dues, fines, premiums or other assessments shall not be deemed usury, although in excess of the legal rate of interest."

The right of such corporation to a premium under the original section, and as the law stood up to May 8, 1886, and the amount of such premium depended entirely upon the borrower. The corporation could not fix a premium which would bind those who desired to obtain a loan from the funds of the corporation. The statute gave to the corporation no power to fix premiums. All it could do was to offer its money and the amount bid as a premium by the borrower fixed the amount of the premium. The premium was not upon the money to be loaned, but was for the sole purpose of securing the right to first obtain the money

offered. Under this provision of the statute the Supreme Court in *Ohio v. Greenville, etc. Assn., supra*; *Ohio v. Oberlin B. & L. Assn., supra*, and *Bates v. Peoples, etc. Assn., supra*, properly held that no premium could be assessed by the corporation; and that no sum could be charged by it, as premium, in excess of the sum actually bid by a borrower, "for the right of precedence in taking a loan, at a competitive sale of such right." Section 3, Syllabi, *Bates v. People, etc., Assn., supra*.

If these decisions of the Supreme Court furnish a basis for a construction of the statute as amended May 8, 1886, and May 1, 1891, which is now in force, there can be but little doubt as to the sum charged as premium in this case being usurious; for no claim is made by the plaintiff in argument that any sum was bid as a premium for the right of precedence in securing the loan, and the answer avers that no such bid was in fact made; and this averment is admitted by the demurrer to be true.

Under the original statute upon which these decisions are based, the corporation might "levy, assess and collect from its members such sums of money, (1) by rates of stated dues, (2) fines, (3) interest on loans advanced, and (4) premiums bid by members or depositors for the right of precedence in taking loans." The corporation, under these provisions of the statute, had the right (1) to fix the "rate of stated dues;" (2) the amount of "fines" and (3) the rate of "interest," within the limits prescribed by the statutes fixing the rates of interest in Ohio. And it might "levy, assess and collect" these sums. As to these the borrower was bound by the act of the corporation; and if he desired to obtain an advance of money from the corporation, he must comply with the requirements made by the corporation; but as to the amount of premium which the corporation might "levy, assess and collect" from him, under the broadest construction in favor of the corporation possible, the power of the corporation was limited by the act of the borrower—he fixed and limited by his bid the amount of such premium, which could be "levied, assessed and collected" from him.

The statute now in force confers upon the corporation the right "to assess and collect from members and depositors (1) such dues, (2) fines, (3) interest and premium on loans made or (4) other assessments, as may be provided for in the constitution and by-laws." These powers are to be exercised by the corporation, and by it alone. By no provision of the present statute is the borrower given any voice in fixing the amount of premiums which may be "assessed and collected" from him. There is no material difference between the provisions of the present statute and the amendment of May 8, 1886, which first denied to the borrower the right to fix, by his bid, the amount of premium he would pay, which right was conferred upon him by the original statute.

The court is constrained to assume that the legislature was advised of the holdings by the Supreme Court as to the right of the borrower to fix, by his bid, the amount of premium he should pay and further that the case of *Bates v. Peoples, etc., Assn., supra*, decided less than a year before the amendment of May 8, 1886, was before the legislature for consideration, the Supreme Court having held that the premium bid by a borrower was not a premium on the loan, but was a premium bid "for the right of precedence in taking a loan, at a competitive sale of such right."

When under such circumstances the legislature, by an amendment of the statute, which furnished a basis for these decisions, took away from the borrower the right to fix the amount of premium the corporation might "assess and collect" and by plain and unequivocal language con-

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ferred upon the corporation the right to "assess and collect," "not only such dues and fines" but interest and premium on loans made" but other assessments, as may be provided in the constitution and by-laws," the conclusion is irresistible, that it was the intention of the legislature (1) to deny to the borrower the right to fix the amount of premium on a loan; (2) to confer upon the corporation, alone, the right to fix the amount of premium a borrower should pay and (3) to make the sum charged as a premium, a premium upon the loan, and not a premium "for the right of precedence in taking a loan, at a competitive sale of such right."

The statute in force at the time this loan was made authorized the plaintiff to demand of the defendant a sum as premium, which the statute declares is not usurious.

Article ten of the constitution adopted by the plaintiff and under which this loan was made requires that the board of directors "shall prescribe by by-laws * * * the terms, conditions and securities upon which loans shall be made and canceled."

Section twenty-seven of the by-laws adopted by the corporation provides for making loans for the period of ten years and contains an example upon the basis of a loan of \$1,000 the monthly dues for one hundred and twenty months, the actual net cost to the borrower for the entire term, and the average cost of the loan per year and provides that "said installments on such loans shall include interest and premium that might otherwise be bid by the borrower."

Section twenty-eight of the by-laws provides that loans shall be made in the order of the filing of applications for loans; those first filed to have precedence.

On the back of this bond evidencing the loan to the defendant is a redemption table showing the amount due each month on the basis of a loan of \$1,000 with the amount to be paid each month, and its application (1) to interest and premium and (2) to principal with the total credit, including each payment upon the principal, and the balance then due upon the loan.

By the stipulation below this table the defendant over his own signature agreed to accept the loan, make payments on the basis set out in the table, and that so much of each payment should be applied to the payment of "interest and premium."

No competitive bid being required by the statute, or by the by-laws of the corporation, and the statute authorizing the assessment of a premium by the corporation and, by express provisions, having declared that such premium is not usurious, and the defendant having by express stipulation, separately signed by him, agreed to pay this premium, no sufficient reason is apparent why the court should hold that the plaintiff is demanding a usurious rate of interest of the defendant.

The demurrer to the answer is sustained.

Andrew J. Hess, for plaintiff.

S. L. Wicoff and D. Oldham, for defendant.

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REFORMATION OF INSTRUMENT.

[Clark Probate Court.]

CHAS. ADLARD V. WM. F. STOCKSTILL.

1. The probate court has jurisdiction to reform a mortgage where an assignee for the benefit of creditors petitions to sell the land of the assignor, and a mortgagee by cross-petition asks for the reformation of his mortgage in which the premises in question are incorrectly described.
2. An assignee for the benefit of creditors takes the property subject to the rights which existed at the time of the assignment, and if no creditor has a superior equity to a mortgagee, and the same is not prevented by statute, he may have his mortgage reformed and declared a lien upon the property in the hands of the assignee.

ROCKEL, J.

On ———, 1895, Mr. F. Stockstill made an assignment of all his property to Chas. Adlard. Sometime thereafter the assignee brought an action in this court to sell the real estate assigned. In the partition Horace W. Stafford was alleged to have or claim to have some interest therein and was made a party defendant, and filed the following answer which correctly states all the facts in the case, there being no claims other than general creditors.

"Now comes Horace W. Stafford, and leave of court being first granted to file an amendment to his original answer and cross-petition herein, files this his amendment to said answer and cross-petition and says, that on the ninth day of September, 1893, the defendants William F. Stockstill and Jennie Stockstill, his wife, duly executed and delivered their certain mortgage deed to secure the payment of the promissory note in his original answer and cross-petition described, and thereby intended to convey to him the following described premises, situate in the county of Clark, state of Ohio, and in the town of New Carlisle, and bounded and described as follows: Being all of lots No. 330, 331, 328 and 329 in Rannels, Stockstills and Hoffa's addition to the town of New Carlisle, Ohio, but by mutual mistake of all parties described said lot No. 328 in said Rannels, Stockstill and Hoff's addition to said town of New Carlisle, Ohio, as lot No. 338, in said addition to said town of New Carlisle, Ohio, which error was made by the scrivener, and was, in fact, a clerical error only and made by the mutual mistake of the parties thereto.

"That at the time of the execution and delivery of said mortgage the said William F. Stockstill and Jennie Stockstill were not the owners of any lot in said Rannels, Stockstill and Hoff's addition aforesaid, of No. 338, and were not the owners of any lot in said town of New Carlisle of the No. of 338.

"This defendant further says that his said mortgage aforesaid was duly left with the recorder of Clark county, Ohio, for record on September 11, 1893, at 8:40 A. M., and was by said recorder duly recorded in mortgage book No. 75, page 594, 550, of his records.

"This defendant further says that the mistake aforesaid in the description of said lot No. 328, was unknown to him or said William F. Stockstill or Jennie Stockstill until after the former order of sale, appraisal and advertisement of sale of said premises in the petition described and was not discovered until after the report to this court, that said lots did not sell for want of bidders.

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"This defendant therefore prays that the description of said lot referred to as lot No. 338, in his said mortgage be reformed so as to describe said lot as No. 328 in Rannels, Stockstill and Hoffa's addition to the town of New Carlisle, Ohio, that the same may be appraised and sold according to law in such case made and provided by statute, that the proceeds arising from same be applied to the payment of his said note in his original answer and cross-petition described; that his said mortgage be found and declared to be the first lien on said lot No. 328 as aforesaid, and that he may have such other proper relief to which he is entitled either in law or equity."

The questions thus presented to the court are, 1st: Has the court jurisdiction to reform the mortgage? 2d: Can a mortgage be reformed as against the property of an assignor after the same has passed into the hands of an assignee in trust for the benefit of creditors?

These will be considered in their order. The power, or jurisdiction if you desire to so designate it, of the probate court in matters of assignment has been before considered by this court, but not on a like question.

In the case of *Kiefer v. Spence*, 7 O. D., 386, decided in 1891, it was held that in assignment cases this court has authority upon the answer and cross-petition of a mortgagee to give him affirmative relief, etc. It was stoutly contended in that case that this was in effect the foreclosure of a mortgage and the exercise of an equity power, only existing in the court of common pleas. In a full and somewhat lengthy examination of the statute in relation to assignments and the decisions of our Supreme Court the conclusion was then reached that the probate court "had full, ample and complete jurisdiction to determine all questions, either equitable or legal, that are necessary to do equity and justice to all parties in interest in order to enforce the proper and just administration of the trust."

Upon a careful re-reading of the opinion in that case, I see no reason to depart from this conclusion. Several cases, however, have been before the Supreme Court in reference to jurisdiction in assignment cases since that time, which will be referred to hereafter.

Again in *Wilson v. Swigert*, 1 O. D., 418, in this court, it was held that a mortgagee cannot maintain an action of foreclosure on a mortgage claim in the court of common pleas, after the debtor and owner of the lands has made an assignment for the benefit of his creditors, and that in all matters of assignment where the probate court has power to grant complete relief, its jurisdiction is exclusive, unless expressly taken therefrom by statute.

This decision met with considerable comment, favorable and unfavorable, from the bar throughout the state, 31 B., 4, 13, 29, 65, 97, 81, 113, 129, 147.

In the recent case of *Havens v. Horton Jr.*, 53 O. S., 342, the Supreme Court has arrived at the same conclusion, and in the still more recent case of *Mercer v. Cunningham*, 53 O. S., 353. Judge Shauk laid down these two propositions, 1st: The filing of the deed of assignment and qualification of the assignee confer upon the probate court jurisdiction over all the assigned property. 2d: The jurisdiction so conferred is exclusive in all respects in which it is adequate.

In the opinion it is also said: "All legislation affecting the jurisdiction of the probate court has been with a view of its enlargement."

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In *Clapp v. Banking, etc.*, 50 O. S., 537, it is said: "Although the probate court is of limited and statutory jurisdiction, it is we think, a mistake to suppose that it has no equity powers unless the same are expressly conferred. A power given to make a particular order implies authority to hear and dispose of all questions which it is necessary to settle before making of such final order, unless the needed authority is distinctly denied."

Again, "Now in order to ascertain what amount is in the hands of the assignee, subject to distribution among general creditors, it is necessary that the fact of who are general and who preferred creditors, should first be ascertained. This involved the very matter in dispute in this case."

"The court must necessarily decide whether there are preferred creditors, and who they are. No distribution among general creditors can be made until this is done."

This language is peculiarly applicable to the case at bar. Before an order of distribution can be made among general creditors, it would be necessary to determine whether the holder of this mortgage claim is a general or a preferred creditor. The trust cannot be terminated without such a decision.

Again in the case of *Clapp v. Banking, supra*, the court quotes from 13 Am. & Eng. Enc. of Law, that "an equitable lien is a right not recognized at law, to have a fund or specific property, or its proceeds applied, in whole or in part, to the payment of a particular debt or class of debts." And holds that under sec. 6351, Rev. Stat., which provides that where there is any question in regard to the title of the lands to be sold, the assignor may commence a civil action in the probate court, and that such court may determine the question involved in regard to the title to the same; that such a lien may be passed upon by the probate court. The claim under consideration in the case at bar is an equitable lien, and therefore comes within this decision.

In *McNeil v. Hagerty*, 51 O. S., 255, it is said: "All persons claiming an interest in or upon the fund are subject to the summary jurisdiction of the court." Using the word "court," as meaning probate court.

In the case of *Doan v. Bitely*, 49 O. S., 88, it was held that (1). "The proceedings of an executor or administrator to sell the real estate of the deceased, to pay the debts and costs of administering his estate, whether prosecuted in the court of common pleas or probate court, is a civil action, in which any person may be made a defendant, who has or claims an interest in the land, or who is a necessary party to a complete determination of any question involved in the action."

"(2). The probate court has jurisdiction to try any question of fact arising in such action therein prosecuted, or afford the parties a trial by jury, when the nature of the issues entitles them to a jury trial or renders it appropriate."

"(3). Proper practice in such cases requires all persons claiming an interest in the land, to be brought before the court and all questions affecting the title adjudicated and settled, that purchasers may buy with safety and the property bring its fair value."

This is applicable to the case at bar in this, that the court decides what is proper and commendable practice in civil actions brought to sell real estate, and defines who are proper parties in all civil actions.

The statute in reference to assignments gives to the assignee in specific words, the right and duty where there are conflicting interests in

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the land to be sold, to commence a civil action, to determine same. In this respect the statute is broader, or rather more specific in relation to the assignees than to executors or administrators.

In the case at bar, if this court has no jurisdiction to reform the mortgage, then the mortgagee must commence an action in the court of common pleas to have the same reformed, and this trust must remain open until the matter is there adjudicated.

Upon this phase of the question, the following from the opinion of Doan v. Bitely, *supra*, is forcibly applicable:

"The policy of our legislation has long been opposed to the necessity of a resort to different jurisdictions and multiplicity of actions, in order to obtain a full and final relief to which parties may be entitled, and in favor of clothing tribunals once acquiring control of the subject matter of a controversy and of the parties, with jurisdiction, if capable of exercising it, to determine the ultimate rights of the parties and administer to them their complete remedy.

"The policy is a commendable one, with which the statute, making actions like the one under consideration, civil actions, and giving the probate court co-ordinate jurisdiction with the court of common pleas, is in harmony."

It seems to me therefore, that the statute and these decisions furnish three grounds for upholding the jurisdiction of this court, in the case at bar.

1st. It is necessary in order to determine whether the mortgagor is a preferred or general creditor, so that a distribution to general creditors may be made.

2. That the statute giving the assignee power to commence a civil action in this court clothes this court with power to hear and determine all claims, either legal or equitable, in relation thereto.

3d. That this court has jurisdiction in order to prevent a multiplicity of suits and expedite the settlement of the trust.

This brings us to the second question. Will a court reform a mortgage as against the property of an assignor after it has passed into the hands of an assignee in trust for the benefit of creditors?

The case of Davenport v. Scovil, 6 O. S., 459, settles the law for Ohio, that as between the original parties where the defect of the mortgage is one of description only, that it will be reformed. In the same case it is held, because former courts had so held, that if the defect was one relating to the execution or the recording of the instruments, it could not be reformed.

In Strang v. Beach, 11 O. S., 287, the court quotes the old equitable rule that a mortgage will be reformed not only between the parties, but those claiming under them in priority, as heirs, legatees, devisees, voluntary grantees, judgment creditors, or purchasers from them, with notice of the facts.

And again in Bundy v. Iron Co., 38 O. S., 312, it is held, if the statute does not prevent, an equitable mortgage will have priority over all lien holders and other claimants, except bona fide purchasers. This is an adherence to a doctrine well established in equity. The reason therefore that a mortgage defectively executed or not recorded, or a chattel mortgage not recorded or left for record, is void, as against the assignee, while good as between the parties, is by reason of our statutory enactments.

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The recording acts only apply to bona fide purchasers for value. And our courts have held that an assignee is not such a purchaser.

Thus in *Mannix v. Purcell*, 46 O. S., 135, it is said: "All property subject at law or in equity to the payment of John P. Purcell's debts, whether held nominally in trust or not, passes by the assignment to the plaintiffs below.

"No higher or better right or title to any of the property passes to the assignee than the assignor held. His creditors acquired no new right or remedies in or against it by force of the assignment.

"The assignee simply represents them and their rights which he has undertaken to enforce by the plain processes appointed by statute. They do not in any sense stand to the assigned property in the relation of purchasers."

In *Morgan v. Kinney*, 38 O. S., 610, Judge Longworth says: "The doctrine is well settled, that in respect to real estate the assignee for the benefit of creditors stands in the shoes of the assignor, and takes no greater estate than that held by him.

"He takes subject to all liens and incumbrances existing at the time of the assignment, and is not to be regarded in equity as a bona fide purchaser without notice."

In the case of *Clapp v. Banking*, *supra*, it was held that the term lien in its general acceptation includes equitable liens, and therefore we are brought to the conclusion that the language of the court, in the two decisions last referred to, would justify us in holding that the assignor in the present case took the property subject to the equitable lien of the mortgagee in this case.

Again in *McNeal v. Hagerty*, *supra*, the judge rendering the opinion says: "The effect of the assignment is to devote the property absolutely to the satisfaction of the debts of the assignor just as they existed at the time of the assignment."

At the time of the assignment this mortgage could have been reformed and held as a lien on the property of the assignor, therefore if the assignee receives the property subject to all claims as they existed at the time of the assignment, he would take it subject to the lien in question.

In *Simon v. Oppenheimer*, 20th Fed. Reporter, a somewhat similar question under the Iowa law was under consideration by the federal court. Here the court seemed to hold that an equitable lien against the assignor would be enforced as against general creditors, and could only be questioned by a lien holder upon the property on which it is sought to impress the equitable lien. The language used is as follows: "The debts described in the mortgages being actually due to the mortgagor, the title passed by the execution of the mortgages, and the instruments were therefore valid and binding upon the mortgagor.

"Under these circumstances the assignee stands in the same position as the assignor under the statute of Iowa. He takes the property subject to all the rights and equities which the mortgagees could have asserted against the assignor. *Roberts v. Corbin*, 26 Iowa, 315.

"Having been given to secure an actual indebtedness, the validity of the mortgage can only be questioned by a creditor who can show a superior right or equity and who has taken the proper steps to assert the same by obtaining a lien upon the property or a judgment with the right to a lien if property can be discovered."

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In the case at bar there are no judgment creditors or lien holders on the premises upon which it is sought to impress the mortgage lien of Mr. Stafford.

In Mellon's appeal, 37 Pa. St., 129, it was held that an unrecorded mortgage would have a preference over general creditors; on the theory that as it was valid between the original parties, and the assignee stood in the shoes of the assignor, it would have the same effect after the assignment as before. This is not the law in Ohio, by reason of our recording acts. But the language used is pertinent as throwing light upon the subject of the assignee's position in reference to the property of the assignor. The following is from the opinion:

"The question therefore is, whether the mortgage was a lien upon the lands in the hands of the assignee, although it was not recorded until after the assignment. If it was, then it is entitled to full payment; if it was not, then it is only entitled to a dividend with the general creditors. The object of the statute is construed to have been to affect purchasers and creditors, either mortgagors or judgment creditors—against secret liens. But an assignee holding in trust for the benefit of creditors, is not as such a creditor, nor is he a bona fide purchaser for value."

In Wolf v. Eichelberger, 2d Penn., 346, it was held that neither the assignee, nor the general creditors are such purchasers. The assignee is the representative of the assignor and is affected by all the equities which existed against the property in the hands of the assignor, enjoying his rights except that the property is protected from execution in his hands. He is in no sense the representative of the creditors, and therefore can not take to himself any of their rights, and even if he could, they do not take as purchasers or as lien holders under the assignment. Proceedings in bankruptcy are very much similar to those provided by assignment laws.

In Stewart v. Platt, 101 U. S., 731, it is said: "In Yeatman v. Savings Insurance, 95 U. S., 589, we held it to be an established rule that, except in cases of attachment against the property of the bankrupt, within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens or incumbrance, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt.

"He takes the property in the same plight and condition that the bankrupt held it. Windsor v. McLean, 2 Story, 493."

It therefore seems to me that as the assignee takes the property subject to the same rights that existed at the time of the assignment, and no creditor having a superior equity to the mortgagee, and the same not being prevented by statute, it is proper to hold that the mortgage in the present case may and should be reformed and declared a lien upon the lot which it was the intention of the parties to have described in their mortgage.

In re Lizzie Brennan.

ADMINISTRATOR.

[Clark Probate Court.]

IN RE LIZZIE BRENNAN.

1. A person entitled under the statute to the administration of an estate will not be appointed, where it appears that he has an interest or claim in the estate antagonistic to that of the devisees or legatees under the will, and it seems probable, that if appointed, litigation would ensue which would decrease the shares of such legatees or devisees.
2. The one entitled to such appointment under the order provided in the statute need not be either mentally or morally incompetent to justify the court in refusing to appoint him where it appears that such appointment would be detrimental to the estate.
3. An administrator ought in all instances to be one in whom all parties in interest have complete confidence, and whom they can approach at all times, without embarrassment, to confer and consult in reference to the management of the trust, and if the next of kin is not such a one, the court will, in its discretion, appoint another.

ROCKEL, J.

Luke Brennan, the husband of Lizzie Brennan, deceased, has made his application to this court to be appointed administrator of the estate of his late wife.

This is resisted by the trustee of his children on the ground, that from the facts and circumstances in the case, he is an unsuitable person, etc. Lizzie Brennan died testate. In her will she devised all her property to her sister Mary Kizer to hold in trust for her two children, Mary Brennan and Warren E. Brennan, until the younger shall arrive at the age of twenty-one years, when it should be divided equally between them.

She made no mention or provision for her husband in her will. The property she had was largely inherited from her father. Her marriage was rather against the will of her father and his family. The court does not know that the husband ever accumulated anything.

Lizzie Brennan died seized of an undivided one-fourth interest in all the real estate owned by her father at the time of his death, subject to the dower interest of her mother. She had some household furniture, the ownership of which between herself and husband seems to be in dispute, and about \$500 to her credit in one of our banks. She left no debts other than those incurred during her last illness and her funeral expenses, in all amounting probably to \$200. Sometime before her death, about five months, she gave to her mother \$1,000 to be expended by her mother for the use and benefit of her two children, legatees under her will.

The husband claims that this gift is invalid, and that the said one thousand dollars is an asset of the estate of his deceased wife, and should be turned over and be distributed as such. There being no debts, upon distribution he would receive \$400 of it, and the children the remaining \$600. The contention over this \$1,000, and the fact that Mrs. Brennan gave her property in trust to her sister, for the benefit of her children, and in that manner deprived her husband of the control of the same, together with the fact that there was never an over-cordial feeling existing between the parties, has caused a feeling of much bitterness to exist at this time.

It is such as would absolutely prohibit the direct transaction of any business of any kind whatever between the husband and the trustee of

his children. I have no doubt that the one thousand dollars given to the grandmother of the legatees under the will of Lizzie Brennan will be by her properly applied to the use and benefit of said legatees.

If the same is collected by the administrator, their portion will be about \$600, and thus it will be seen that this applicant for administration, in addition to the existence of a feeling of bitterness and hostility, in an indirect way, has a claim antagonistic to that of the heirs of his wife and the legatees under her will. He admits that one of the reasons for desiring that there be an administration over his wife's estate, is for the very purpose of recovering this \$1,000, and further that he intends to pursue and recover it if possible so to do.

One of the grounds upon which the trustee resists the appointment is, that there are grave doubts whether this \$1,000 belongs to the estate of said Lizzie Brennan and can be recovered by an administrator; and that this applicant's interest and feeling is such that it would deprive him of a fair consideration of the matter and that he might thus be led to plunge the estate into needless and expensive litigation, involving costs in event the litigation was fruitless, that would more than exhaust the small amount of personal estate and require the sale of real estate to meet the same, and thus do immeasurable injury to the heirs of the deceased and the beneficiaries under her will. And this is not an impossible result.

Under sec. 6005 the husband has the first right to administer upon the estate of his deceased wife, and the probate court has no right to deprive him of that right except for cause. *Estate of Garrettson, Goebel Probate R. H., 87.* Giauque, however thinks that, because the court may remove an administrator or executor for habitual drunkenness, gross neglect of duty, incompetency, fraudulent conduct, removal from the state, or because there are unsettled claims or demands existing between him and the estate, which in the opinion of the court, may be the subject of controversy or litigation between him and the estate or persons interested therein, or any cause which in the opinion of the court renders it for the interest of the estate (sec. 5995), it is evident that the court is invested with the widest discretion as to who may be allowed to be such trustee, when the best interests of the estate may in any way suffer through such trustee, and that the inference is strong, if not irresistible, that if the court may remove such trustee for any of the causes mentioned, after the expense and trouble of getting him installed, such court may refuse to appoint one who immediately after such appointment, should be removed from the trust.

Giauque on Settlement of Estates, page 203. This is a logical conclusion, but I am not sure that it states a rule to be followed in all instances. If the legislature would have intended to confer this broad discretion upon the court in considering the application for the appointment of an executor or administrator, it would be fair to presume that such provisions would have been placed in the statute providing for appointments, and not alone in a section providing for the removal of an existing administrator or executor. Then, too, I think a different rule should apply to executors than to administrators. An executor receives his right to the appointment, by virtue of the will of the deceased.

A person has a right while in sound mind and judgment, to make such disposition of his property as he chooses. This would carry with it the right to name such person as he might choose to carry into effect the provisions of his will and administer upon the estate.

It is fair to presume that a testator is better acquainted with his executor than the court; that he knows more of his qualifications that may fit him to carry into execution the provisions of his will in the way that he desires. Strong reasons should exist therefore for not appointing one named in the will of a deceased person. They should be such incapacities as the statute and common law recognize as making him incompetent. The rule as to administrators is more liberal and while there may not exist this broad discretion contended for by *Giaque*, in considering who are entitled to the appointment as administrators on the estate of deceased persons, there is a discretion resting in this court as to whether or not the person entitled to administration is incompetent or evidently unsuitable to administer the trust.

It will be conceded that within the ordinary accepted meaning of the word, Mr. Brennan is not incompetent; that is, he does not lack ability so far as the evidence shows to administer the trust; although it is not clear to distinguish what is included in "incompetency" as different from "unsuitability." They both mean an improper person to administer the trust.

But do the facts show him to be either incompetent or unsuitable? If he is an unsuitable person, it must be by reason of his antagonistic interest and the animosity existing between him and the trustee of his children. Ill feeling between the parties direct in interest in an estate has been held sufficient to refuse the appointment of either. In *Drews' Appeal*, 58 N. H., 320, it is said: "The word incapable cannot be limited in its application to the mere case of mental or physical incapacity, but must be understood to include the idea of unfitness, unsuitableness."

The use of the word unsuitable in the second section of the statute referred to, and the remark of the court in *Murry v. Webster*, 24 N. H., 17, that the next of kin must be taken to be a suitable person, favor this construction. An interest that disqualifies one from fairly considering the interest and claims of another in the same matter, renders him unsuitable to be entrusted with its management, and a feeling of hostility, so intense as to cause one to resist with personal violence the claims and rights of others held in common with him, not only renders him unfit for, but also practically incapable of managing the common interest.

The law does not encourage a private feud. Neither of the contending parties should be entrusted with the power of administration, because there is reason that farther animosity would lead to an abuse of the trust. In *Bridgeman v. Bridgeman*, 3 S. E. R., 582, W. Va., 1887, the applicant was asked if his relations with his brother were friendly or unfriendly, and he said: "It would be considered unfriendly, because we have been lawing so much. So far as I am concerned, I have no ill feeling." Being asked if he would not bring another suit, as administrator if he had the appointment conferred, he said: "I don't know for what, I don't know of any suit, because if I get this appointment and he settles with me fair, I would end it."

In the opinion the court says: "But his claim that what estate his mother had left was given him, and the unfriendly feeling existing between him and his brother, who had applied, was perhaps the reason why the court did not appoint him. * * * It seems to me the hostility of this non-resident distributee, even had he been a resident of this state, would have justified the court in refusing to appoint him." This case is very much like the one at bar. If the grandmother, Mrs. Kiser, will turn over to the administrator the \$1,000 she holds instead of using

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it for the benefit of her grandchildren, as directed by their mother, his wife, there will be no suit. But if she does not there will be. It is true Mrs. Kiser is not directly interested in the estate of her daughter, Mrs. Brennan, but as the grandmother of her children she is certainly interested in their welfare. In estate of Pike, 45 Wisconsin, 391, it was held to be sufficient to remove an executor where at the time of the filing of the application there was and still continues to be an acrimoniously hostile feeling between the executor and the legatees which intercepts and prevents such a management and husbanding of the estate, as prudence, sound policy and the interests of the devisees and creditors require. So in the case at bar, there is danger to these minor devisees under the will of Mrs. Brennan that their estate might be largely depreciated by reason of the hostility existing between their father and their grandmother and trustee, were he to receive the appointment as administrator.

These minors are the special wards of this court, and it owes a duty to them to make no appointment that might possibly result to their injury. In a controversy over this \$1,000 they are sure to be the losers. If the administrator succeeds in recovering it, they will lose at least \$400 of it. If he loses his suit, as legatees under their mother's will, they will be entitled to a less share by reason of the costs incurred. They are therefore in the highest degree interested that no frivolous suit be brought or expensive litigation incurred.

In *Pickering v. Pendexter*, 56 N. H., 71, it is said: "If John L. Pickering was a suitable person, he would seem to be entitled to the appointment. That ordinarily he would be regarded as a suitable person is not denied; but it is said that he has interests adverse to the heirs and the creditors, and therefore could not properly discharge the trust, and we are inclined to think this objection to him to be well founded. It would seem that he asserts a claim to a considerable portion of the land in the possession of the deceased at his death, and that this claim is controverted by her heirs, and it may be the duty of the administrator to contest this claim or at least to investigate it thoroughly and determine fairly whether it ought or ought not to be contested: and for neither of these duties would he be a suitable person. It is argued by his counsel that he must give bond for the faithful discharge of all his duties, and that is true: and yet we think it would not be a sound exercise of discretion to appoint a person whose interest is clearly opposed to the persons for whom he acts."

The words just quoted are applicable to this cause. The only person for whom the administrator should act, there being no creditors, are the husband, and if he were administrator, for himself, and these two minor legatees. And these legatees surely sustain such relation to this \$1,000 in controversy, that they should have a disinterested administrator, one who would "at least investigate the claim thoroughly and determine fairly whether it ought or ought not to be contested."

An administrator ought in all instances be one in whom all parties in interest have complete confidence, and whom they can approach at all times, without embarrassment to confer and consult in reference to the management of the trust.

As remarked by the court in *Drew's Appeal* before herein quoted from, the law does not encourage a private feud and as a general rule it may be said that the appointment of one mixed up in a family quarrel, embarrasses the management of the trust and all persons connected

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therewith, and the probate court ought in all such cases to have an absolute discretion in the refusal to make an appointment of that kind.

From all the facts and circumstances of this case, the peculiar interest and position of the minor legatees, I am of the opinion that in the exercise of a sound discretion, this court is warranted in finding that the applicant is evidently unsuitable to receive the appointment as administrator of his wife's estate, and his application will therefore be refused.

The next of kin being incompetent by reason of minority, and unsuitable for the same reasons that the applicant is, the court will appoint a suitable person, suggested by the parties and agreed to by all, or if they are unable to agree upon some one, the court will make the selection.

James Johnson, Jr., for applicant.

F. M. Hagan, for trustee.

DITCHES—DAMAGES—JURY.

[Clark Probate Court.]

WM. S. THOMAS ET AL. V. BOARD OF COUNTY COMS. & W. W. WILSON.

1. To effect the drainage of malarial lands and make them fit for habitation and use, is a purpose sufficiently public to justify the exercise of the right of eminent domain.
2. If a proposed ditch will in any reasonable degree contribute to the public health, convenience or welfare, it is "conducive to the public health;" it need not be absolutely necessary.
3. If the ditch as a whole is "conducive to the public health," it is immaterial that certain parts taken by themselves would not be so.
4. The fact that the ditch will enable the adjacent land owners to raise larger crops, is not enough to show that it is conducive to the public welfare.
5. The word "public," as used in connection with the words, "health, convenience or welfare," has reference to the people of the neighborhood.
6. The fact that the improvement could be accomplished by cleaning out old ditches, does not prevent the establishment of such new ditch.
7. Whether such proposed ditch is practicable, depends, not upon whether it is the best route, but that it is not an unreasonable one, in reference to the object sought.
8. The width of the land appropriated, and that for which compensation should be allowed, is that taken by the proposed ditch from the top of each side thereof.
9. The measure of compensation in such case should be the fair market value of the land taken, irrespective of any benefits conferred upon the owner by the construction of the ditch. This market value is to be fixed at the time the property is appropriated, and will be held to be the selling value of such land.
10. The market value is not that realized upon a forced sale at a short notice, but the highest price which could be obtained after a reasonable time and notice, from those having the ability, occasion and desire to buy.
11. The damages to be awarded the adjoining owners, consists of whatever actual injury, not remote or purely speculative, is caused to the lands by the proposed ditch.
12. The object of allowing the jury to view the premises, is to allow them to apply their own judgment to the questions to be determined, as well as to better understand the evidence.
13. During the view of such premises, the jury may ask the surveyor questions concerning matters of fact, but he is to express no opinion thereon.
14. In arriving at their conclusions, the jury should take counsel of their own experience and knowledge of like subjects.

Instructions of the court to the jury on going out to view the premises.

ROCKEL, J.

Gentlemen of the Jury :

The instructions that the court will give you now are not the final instructions in the case: The court will instruct you again. That will come after you have heard the evidence and had a view of the premises.

By the statute you are required to consider four questions in this case, because these questions have been raised by the appeal of the plaintiff.

The first question that you will be required to answer is whether said ditch will be conducive to the public health, convenience or welfare. It is required by the laws of our state that before any public improvement can be made and lands appropriated, the lands of a person taken—that there must be a finding that it is for the public health, convenience or welfare. Public health, convenience or welfare, as used in the statute and generally applied where lands are taken for a public purpose, means that it is for the benefit of the community, for the benefit of the neighborhood, to improve the country. It is for the many instead of a single person.

An improvement may be conducive to the public health, convenience or welfare if only upon one man's lands; but if the only purpose the ditch accomplishes if created would be to enable a person to raise more grain or to drain one person's lands, it would not cause it be conducive to the public health, convenience or welfare; but a ditch that would drain a country or farm, and thereby lessen the liability to malaria, as where swamps exist, or where public highways might be kept in better repair, or generally benefit the community—that would be something that would be conducive to the public health, convenience or welfare.

And the second matter to be determined is whether the route laid out and determined in this case is one that is practicable; that is, if the ditch be constructed upon this line, will it perform the functions of a ditch; that it will do what a ditch of that kind usually and ordinarily does do; that is that it will perform the offices and purposes of a ditch.

If you should find that the ditch when constructed would not perform the duties of such a ditch, and would not drain the land, would not have an outlet and such matters, you might then find that it would not be a practicable route.

And the third question is the compensation for each of these parties for the land taken by the ditch. This is a public improvement, and under our constitution, before land can be taken for a public improvement, the owner is entitled to receive just compensation for the amount of land taken by the improvement. You will determine that matter. And the fourth will be the damages due to the appellants; that is, for injury to the appellant's land on either side of the ditch because of some injury: these are matters for your consideration.

I have already said that you will receive further instructions from the court after you have viewed the ditch and heard the evidence. Your duties in this case are larger than that of the ordinary jury. You may apply the evidence which you may acquire from the view, in determining the verdict; therefore you will observe in going over this route anything that will aid and assist you in determining these four questions.

You notice the lay of the lands, its practicability to be drained, the outlet, and all these questions. The sheriff and surveyor will accompany you. Their duty will be to aid and assist you in ascertaining these facts.

You will be at liberty to ask them any questions pertaining to any of these matters, any such thing as you may desire to know. The plat will be with you, they will explain the width of the ditch, its depth, and any such questions as you may desire. You are to ask them no opinion about these questions, and they are to express none. Of course, you may ask the surveyor what the fall is—what the ditch will do so far as the plat will show, and such matters as that, but they are to express no opinion: they have no right to express any, and you are to ask none of them—only for the facts, such things as you may think you may need in rendering a true verdict on these questions. And let me say to you to have no conversation with any landowner that may come there. You are simply to do impartial justice between the parties. You will also have no conversation during the trial of this cause with anyone concerning the matters in issue.

(And, thereupon Mr. Summers of counsel for appellants stated that he desired to note an exception to that part of the instructions as to what the jury might ask the engineer.)

And thereupon the court further instructed the jury as follows: I want you to be clear about this. You will ask the engineer any question that you may think proper to aid and assist you in determining these four questions. The engineer is to exercise great care and caution, and is not to express any opinion of his own, and you are to exercise great care and caution in not asking any opinion of him in reference to these four questions.

(Mr. Summers noted an exception to the instructions last delivered. Mr. Mower notes an exception to that part of the instructions that the sheriff and surveyor are to aid and assist the jury in determining the questions and also to the entire instruction.)

I want to say to you that the sheriff and surveyor are not to aid you in forming any opinion: they are merely impassive agents. Any opinion that they may have is not your opinion, but questions that you desire to ask them to aid you in determining these four questions you are at liberty to ask them.

(AFTER VIEW.)

Gentlemen of the Jury: As was stated to you before viewing the proposed ditch improvement, the court will again instruct you as to the law applicable to the case before you. Some things were then said which will no doubt be a repetition to you, now. The law places upon you the duty of considering four questions.

The first is, whether such ditch will be conducive to the public health, convenience or welfare. The lands of an individual can be taken against his will only when it is necessary to subserve a public purpose or for a public use.

Our constitution provides, "That property shall ever be held inviolate but subservient to the public welfare." Wet lands not only retard cultivation, but are the certain sources of malaria, the prolific parent of disease.

To effect the drainage of such lands, shut off the cause of malaria, make them fit for habitation and use is a purpose sufficiently public to justify the exercise of this right.

You are required to find whether this ditch as located and established will be conducive to the public health, convenience or welfare; that is, whether it will promote or aid in bringing about the health, convenience or welfare of that part of the public affected by want of drainage, or by the improvement to be made, and is not limited or confined to private or personal interests, or to the interests or benefits of a few people of the neighborhood.

In order that this improvement shall be conducive to the public health, convenience or welfare, you need not find that it is absolutely necessary for the public health, convenience or welfare, but if it is conducive, that is, if it tends to or will contribute in any reasonable degree to the public health, convenience or welfare, that is sufficient.

Even if you find that there are parts of the ditch which, if taken by themselves, would not be conducive to the public health, convenience or welfare, yet when considered as an entirety, as one completed improvement, as a whole, from source to outlet and its branches, which must be considered upon this question, it will as a whole be conducive to the public health, convenience or welfare, it will be your duty to answer the first question in the affirmative.

In order to find that this ditch will be conducive to the public health, convenience or welfare, it is not sufficient that you are satisfied that this ditch will drain the lands adjacent to it or enable the owners of adjacent lands to raise larger and better crops, but in order to so find, you must first believe from the evidence and view of the premises, that the public health, convenience or welfare is affected, or in some way suffers from the want of such a ditch.

You may be satisfied that the ditch will be a great convenience to, and will greatly benefit the lands along its route, and that it is necessary for its drainage, and yet you will not be authorized to find that the ditch will be conducive to the public health, convenience or welfare, unless you believe that the public health, convenience, or welfare, is in some way affected by the want of such a ditch. The fact that the ditch might enable the owners of the adjacent lands to raise larger crops is a fact going to show that they would be privately benefited; but it requires more than this to authorize you to find a verdict that the ditch will be conducive to the public health, convenience or welfare. If you find that the petitioners and adjacent land owners are the only persons in any way interested in the location of the ditch, and that it will not also be conducive to the public health, convenience or welfare, then and in that case, you should return your verdict against the proposed ditch.

If you find that by means of the proposed improvement, large quantities of water, which, in times of freshets overflow the turnpikes and bridges in that neighborhood, rendering the same inconvenient for travel, will be carried away more rapidly, and with less injury to the roads or bridges, this will be conducive to the public convenience of the neighborhood so affected.

The fact that there have been old ditches or natural water courses on or near the line of the proposed improvement, and that same could be so deepened and widened by cleaning, so as to accomplish the necessary drainage as well, and at less expense, or that the land could be drained in another direction, does not prevent the establishment of the new ditch, as that is but another mode of accomplishing the same thing.

If you do not believe from the evidence and your view of the premises that the ditch is necessary, that is, that a ditch is needed, to drain

the immediate surrounding country, then you should find that the ditch will not be conducive to the public health, convenience or welfare.

The object of the law is to provide a means of drainage whenever the public health, convenience or welfare requires it. It is not essential that the public at large shall be benefited, but only that part of the public affected by want of proper drainage, or by the improvement to be made. The injury from want of drainage and the benefits from the ditch are necessarily local in their nature. Public welfare, health and convenience in this connection are terms used in contradiction from a mere private benefit.

"Public," as used in connection with the word health, convenience or welfare, means the effect upon the people of the neighborhood—of the vicinity of the proposed ditch, in contrast to the private rights or benefits of the individual; it is that which related to the many in contradiction to the one or comparative few.

In determining this question, you are to consider, as shown to you by the testimony and your view of the premises, the general condition of the lands through which the proposed ditch extends as well as those in the immediate vicinity—the drainage now existing and that to be afforded by the proposed improvement—the capability of the land to be drained—the condition of the public highways and the health of the people in general—the soil, its capabilities, and the crops raised thereon, as well as all other facts observed by you or given in evidence throwing any light upon the subject.

If you find after considering all these matters, in the light of the evidence and your view of the premises and the law as above given you by the court, that the construction of the ditch as proposed will lead to a more healthful community, and a more prosperous neighborhood, and will result in the reclamation or bettering of a considerable quantity of low, wet or swamp lands, or drain stagnant ponds, thereby improving the public highways of the vicinity, and health of the neighborhood, and increasing the productive power and enhancing the value of the land of the surrounding country of the proposed ditch, you would be justified in finding that the proposed ditch will be conducive to the public health, convenience or welfare, and should the first question in the affirmative, the second question you are required to answer is whether the proposed ditch is practicable.

The word "practicable" means that which may be done, practiced, or accomplished; that which is performable, feasible, possible—that which is capable of being performed.

As used here it means, not that it is the best route that might have been selected, but that the route proposed is such a one that if the ditch is dug it will perform the functions of a ditch; that it will drain the lands; that it has proper and suitable fall, and that a sufficient outlet is provided, and that it can be constructed without serious difficulty. It means that the proposed route is not an unreasonable one when considered in reference to the object sought to be accomplished in connection with the surrounding circumstances.

If the route of this ditch is such, and one that if the ditch be made as proposed, it will not perform the offices of a ditch—not have a sufficient fall, a proper course and direction or suitable outlet, to drain the lands proposed, cannot be made without great and serious difficulty, you should find that the route is not practicable. Likewise if a part only of the route of said ditch would be practicable and another part not practi-

cable, so that the ditch will fail to perform the functions of a ditch and drain the country intended to be drained, the route would not be a practicable one.

The law prescribes that no improvement shall be located unless a sufficient outlet is provided. If therefore you believe from the evidence and your view of the premises, that the outlet for this ditch is not sufficient, you should find the route is not practicable.

Likewise if you believe from the evidence and your view of the premises that the ditch will not reasonably accomplish the object for which it was established, you should find that the route is not practicable.

If, however, the proposed ditch has sufficient fall, a proper course and direction, a sufficient outlet to drain the lands proposed, and can be constructed without serious difficulty, and when constructed will perform the offices of a ditch, your answer to the second question should be in the affirmative.

Should the first two questions receive an affirmative answer at your hands from two-thirds of your number, the next and third question for your consideration, is the compensation due each appellant for the lands appropriated by the proposed ditch improvement, irrespective of any benefit that may result to such appellant land owners by reason of the construction of the proposed ditch.

The width of the land appropriated and for which compensation should be allowed, is that taken by the proposed ditch from the top of each side thereof.

For these amounts of land taken you are to allow to each respective appellant full compensation therefor. It is no matter if in your opinion the remaining portion of the appellant land owner's property be enhanced in value by reason of the construction of said ditch, in an equal or greater sum than the value of the land appropriated. The appellant land owner is notwithstanding entitled to receive a verdict at your hands of the full fair market value, of the lands so taken and appropriated.

This market value is to be fixed at the time the property is appropriated, and in this case, that is the present time. The market value is the selling value.

It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability, occasion and desire to buy, are willing to pay. The owner in parting with his property, is entitled to receive as compensation just such an amount as he could obtain if he were to go on the market and offer the property for sale.

I do not mean the price he would realize at forced sale upon short notice, but the price he could obtain after a reasonable time and notice, such as would ordinarily be taken by an owner to make a sale. It is not a fictitious price that should be allowed each appellant but the fair, just market value.

The fourth question you are to answer is the damages due each appellant for property affected by the improvement; that is, if the construction of the proposed ditch causes any damages or injury to the adjoining lands of these appellants, you should allow each one an amount of money sufficient to cover such injury.

In deciding this question it will be proper for you to consider, whether or not the proposed ditch will cause an additional overflow of water over the adjoining lands, and if so, whether it is injurious or not; whether fields are divided into new and irregular parcels; whether the

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adjoining lands are injured by earth thrown out in making the excavation for the ditch; whether crops will be destroyed or pastures injured in constructing said ditch; whether new or additional bridges or culverts will be required. In short, whatever of actual injury, not remote, purely speculative, is caused to the lands of any of the adjoining appellants by reason of the proposed ditch should be by you considered, and the fair amount thereof allowed each appellant as his damage in this case. If, however, in your opinion there is no appreciable injury caused to such lands by any of the above causes, or in such other manner as the construction of such a ditch will cause to the adjoining landowners, and as is usually caused by the construction of such a ditch in a proper and reasonable manner, nothing should be allowed in the way of damages. Yet the full compensation in response to the third question should be allowed.

What is required by law, and that which it is your duty to allow each appellant in reply to the third and fourth questions submitted to you in this appeal, is that the amount or sum of money which you allow each appellant as compensation for land taken and damages affecting this property, will be such a sum as will render to him full compensation for the land taken and the injury caused by reason of the said ditch improvement.

It was proper that witnesses were permitted to testify as to the various matters which would result injuriously or beneficially to these appellants and to the public from the construction of the ditch as proposed. You are the sole judges of what weight is to be given to the testimony of the various persons who have testified in this cause. When the same is in conflict, it is your duty to reconcile it so far as possible. In weighing the testimony of the witnesses you are to consider the bearing of the witnesses on the stand, their evidence, bias or prejudice one way or the other, and you are not to take the average testimony of the witnesses in making up your verdict, this is not the true rule to ascertain the matters for your determination. But you are to weigh the evidence of each witness carefully and decide from his credibility and from your view of the premises what the verdict will be. Neither should you from any means of chance determine the amount of your verdict, but let it be a calm and deliberate conclusion, to arrive at which you have exercised thought and reason, and have given just weight and fair consideration to all the evidence before you.

You were sought to view the lands sought to be appropriated in this case and the location of the proposed ditch. This was for the purpose of enabling you better to determine the questions before you, and to apply your own judgment in regard to them as well as to better understand the evidence.

In arriving at your conclusions, however, you should take counsel of your own experience and knowledge of like subjects, and should not only consider what the witnesses have testified to, but also what you have seen in view, and if witnesses have testified to matter of opinion which you in the exercise of your own good judgment and sense do not believe, you may disregard the same. If you find that the proposed ditch is conducive to the public health, convenience or welfare, and the route thereof is practicable, the fact that a large number of the adjoining land owners are opposed to such ditch should have no bearing or weight with you in determining the questions before you.

Clark Probate Court.

Likewise you have nothing whatever to do with the findings made by the commissioners in this case.

The apportionment of the expense and expenses upon the land owners is not before you. You are to determine all the questions as if the case was originally brought before you, and determine all questions from the papers in the case, the testimony offered, and your view of the premises. Upon the first two questions presented, an affirmative vote of eight will be required to render a verdict in favor of the proposed ditch. Upon all these questions the entire jury must agree before a verdict can be rendered.

A. N. Summers, J. K. Mower, A. H. Gillett, P. S. Olinger, for plaintiffs.

Oscar T. Martin, for defendants.

DITCHES—JURY—NEW TRIAL—VERDICT.

[Clark Probate Court.]

WM. S. THOMAS ET AL. V. COMRS. CLARK CO. ET AL.

1. The construction of drains is an exercise of the police powers of the state, and the necessity for the same may be determined in such manner as the legislature may direct.
2. The questions as to the necessity of the construction of drains are questions which by our constitution are not required to be tried by a jury, and therefore, they are not such questions as would require, under the law, unanimity of the entire twelve jurors to find a verdict thereon.
3. Under sec. 4469, Rev. Stat., it is sufficient for a finding, either for or against the proposed improvement, that eight jurors should agree.
4. The disposition of a motion for a new trial by reason of misconduct of the jury, rests to a very large extent, though not entirely, in the discretion of the trial court. It should take into consideration its knowledge of the case, and the standing of the parties and what is known of the parties making the affidavits.
5. A juror being the adopted son of a cousin of one of the parties defendant, is not such a relationship as will exclude such juror from service on the jury.
6. The fact of such relationship, unknown to the juror, is not ground for a new trial; though had he known his relationship, it would have been his duty to disclose it.
7. The fact of a conversation between a juror and one of the parties to the action on matters bearing upon the action, will not be ground for a new trial, where neither party knew the relation which the other sustained toward the case, and where neither had any wrong intentions, and where it does not appear that the conversation has unfavorably affected the party seeking a new trial.
8. The mere fact that one of the jurors took a ride with one of the parties to the action, while it places the juror in a suspicious position, is not ground for a new trial.
9. A verdict will not be set aside by reason of misconduct of any juror, if the party making the motion had knowledge of the misconduct during the continuance of the trial, and the party filing the motion must show that he did not have such knowledge.
10. Where the county commissioners find in favor of the construction of a ditch, and upon appeal the jury find against its construction, the cost of such proceedings had under sec. 4470, Rev. Stat., must be taxed to the county commissioners.

ROCKEL, J.

The defendants have filed their motion for a new trial, alleging a number of errors, one of which is, that the jury failed to agree, and

another which has reference to the same subject—that no verdict has been rendered herein.

This matter has not been seriously argued to the court. It is claimed, however, that because nine of the jurors returned a verdict finding that the ditch was not conducive to the public health, convenience or welfare, and three jurors held otherwise, that this was in substance not a finding against these propositions, but was a disagreement of the jury, and that therefore it should be tried to another jury, the same as in a disagreement in any other case.

It looks to me, however, from the language of the statute that this was not a disagreement of the jury. It is provided (sec. 4469, Rev. Stat.) that upon these two propositions, to-wit: Whether said ditch will be conducive to the public health, convenience or welfare, and whether the route thereof is practicable, it should be necessary for only eight jurors to agree.

These are questions which by our constitution are not required to be tried by a jury, and therefore they are not such as would require, under the law, unanimity of the entire twelve to find a verdict thereon.

The construction of drains is an exercise of the police power of the state, and the necessity for the same may be determined in such manner as the legislature may direct.

The legislature might have made the finding of the board of county commissioners conclusive upon this matter. But the board of county commissioners not being versed in law, the legislature deemed it wise that these matters might be submitted to a jury presided over by a judge. But it also deemed it wise not to require an agreement of the entire twelve to render a verdict. This was following out the now generally accepted belief that in all civil cases an entire unanimity of the entire jury should not be required to render a verdict, but which cannot be applied in Ohio to civil cases generally, because the same would be an infraction of a constitutional provision. Our statute does not say that eight must agree in favor of these two propositions before there can be a verdict received, and that nothing less will be a final determination of the matter. I think therefore, that the finding in this case is not such as would warrant the court in granting new or re-trial: in other words, that it is sufficient to find either for or against the proposed improvement, that eight jurors should agree.

The other matter which has been most strenuously argued is that the jury had been guilty of misconduct—that four of the jurors during the trial conducted themselves improperly. The first one I will consider is that of Chas. Laybourn. It is said that Charles Laybourn is the adopted son of a cousin of one of the defendants in this case, and while it would not be such a relationship as would have excluded him from service on the jury, yet the defendants claim that they had a right to know it so that they might have exercised or excused him by peremptory challenge if they so desired.

In reply to this matter Mr. Laybourn says in his affidavit that he did not know that he was the adopted child and does not now know that he is an adopted child of a relative of the said plaintiff, Dr. A. W. Laybourn, and that he never knew Dr. Laybourn until this trial. It seems to me that this is not sufficient ground to grant a new trial. If he would have known his relationship, it would have been his duty to disclose it.

The next juror whose conduct will be considered is that of Christian C. Kuqua. The facts as near as I can ascertain them in reference to this

juror's misconduct, are, that while on the view he met one of the plaintiffs and had some conversation with him about the lay of the land and the flow of the water thereon. Mr. Kuqua and Mr. Crabill, the plaintiff, with whom the conversation was had, both allege in their affidavits, that until that time they were not acquainted with each other, and did not then know the position they occupied in reference to this trial.

Mr. Kuqua states that they had gone over the route of the ditch, some seven miles in length, and being a man of seventy years of age he lagged behind the others a distance of seventy or a hundred feet, when he met a man cutting willows, and asked him whose land that was, pointing in a certain direction, and why it was not farmed. The man replied, giving the name of the owner and the reason that it could not be farmed that the water banked over it, and it was too wet.

The sheriff observed this conversation and immediately went over to Mr. Crabill, and said to him that this man was a juror, and he ought to have no conversation with him. I do not see how this misconduct, if such it may be called, should be attributed to any fault of either plaintiffs or defendants in this case, or that it had any particular influence upon the mind of the juror, such as would warrant the court in setting aside the verdict. There does not seem to have been anything intended wrongfully on the part of the defendant or the juror in this conversation. It was a casual meeting, and it does not appear that Mr. Crabill knew that the jury were then viewing the premises. This then brings this matter within the principle laid down in the case of *Armleder v. Lieberman*, 33 O. S., 77, where it is said (p. 82): "There are many cases on this question reported in the books. The rule most clearly established by the cases appears to be, that, however improper the conduct of the juror may have been, yet, if it does not appear to have in any degree been occasioned by the prevailing party, or any one in his behalf, and indicates no improper motive or bias in the mind of the juror, and the court cannot discover that it either had or probably might have had an effect unfavorable to the party asking for a new trial, the verdict should not be disturbed.

The misconduct of a jury in a civil case, which would render it necessary to set aside a verdict and grant a new trial, should be of such a character as to evidence bad intention. *Wright v. Birchfield*, 3 O., 53, 56. The conduct of this juror was reprehensible, but evinced no bad intention.

And further on in the opinion the court say, on p. 83: "While the conduct of the juror was clearly improper, and such as would ordinarily call for animadversion from the court, we wholly fail to discover from the testimony such misconduct as prevented a fair trial or honest verdict.

"A different ruling would not operate justly. It would punish an innocent party for no offence of his. When the juror is guilty of violating both oath and duty by improper conduct, he should be made to answer for it, and not an innocent party, in no way accessory to the misconduct of the juror."

On page 84 the court say further: "Upon the whole, we think the rule that will best secure the desired result, would be, that, in cases where the irregularity or misconduct of the juror appear to have operated in favor of the successful party, and, as a necessary consequence, to the prejudice of the unsuccessful party, a new trial should be granted. On the other hand, where it appears that it has produced no such result, the verdict should be permitted to stand."

The principles of this case are applicable to the one at bar. Neither Mr. Kuqua nor Mr. Crabill had any intention to commit a wrong, and in fact Mr. Crabill did not at the time know that Mr. Kuqua was a juror. It is true that Mr. Kuqua was instructed by the court that he should have no conversation with anyone, but I think the true spirit of the law to be that not every slip of the jury should justify a court in setting aside a verdict.

Jurors ought to be treated as reasonable men. They ought not to be considered with a degree of suspicion. It should be presumed that they would obey the admonitions of the court, and that as reasonable and sensible men they would not allow themselves to get in a position that might unjustly influence their verdict.

The next matter to be considered is the conduct of Andrew Goodfellow and one of the plaintiffs, H. H. Tuttle. It is shown that during the continuance of this trial, H. H. Tuttle, who is a distant relative of Andrew Goodfellow, rode out to his sister-in-law's house some three or four miles in the country with Mr. Goodfellow. It is alleged that during this ride, some conversation was had in regard to this ditch. One George W. Yaezell, who rode with them, says that Mr. Goodfellow made some remarks to him how the jury would stand upon the trial of this case, and that Mr. Tuttle and Mr. Goodfellow talked about this ditch during the ride. This matter is denied, so far as they are concerned in having had a conversation, by both Mr. Goodfellow and Mr. Tuttle.

(2. The overruling or sustaining of a motion for a new trial for reason of misconduct of the jury is one which, while it does not rest entirely in the discretion of a trial court, yet does to a very large extent. In considering the same the court should look at the standing and what is known of the parties who make the affidavits. It should also take into consideration what its eyes bring to its mind, and what it hears during the continuance of the case.

Mr. Goodfellow appeared to the court, during the trial of this case, as a conscientious juror. He tried to be excused from service, but remained upon the suggestion of the court that it was his duty to serve as a juror if possible. He came to the court once during the trial of this case, and made inquiry how they were to ascertain the amount of land to be taken by this proposed improvement, and whether, as the same had been omitted by counsel, he might not interrogate the witness on the stand in reference to this fact.

I merely allude to this to show that it seems to the court that Mr. Goodfellow was endeavoring to honestly perform his duty as a juror, and that he would obey the admonition of the court. Mr. H. H. Tuttle is a minister of the gospel, and a man of the highest standing and reputation, and one whom I can hardly believe would for any consideration falsify himself in his affidavit. There are but two sides to this question, the conversation was either had or it was not had. Without saying anything particularly derogatory of Geo. W. Yeazell the court is not ignorant of the fact that he sometimes indulges in intoxicants and talks to a considerable degree.

It seems to me that taking into consideration all of these facts, and giving to the jury that credit which men occupying such positions ought to be entitled to, and considering the testimony produced in the affidavit that, while perhaps Mr. Tuttle placed himself in a suspicious position by riding with Mr. Goodfellow, yet it is not such misconduct on the part of

either party as would warrant the court in setting aside the verdict. Mr. Tuttle was only one of some twelve parties plaintiff in the case.

An interesting question presents itself. The defendant does not allege or prove in any of his affidavits in support of his motion for a new trial that the alleged misconduct occurred without his knowledge during the continuance of the trial. It is well settled in law that the verdict of a jury will not be set aside by reason of the misconduct of any juror if the party making the motion has knowledge of such misconduct during the continuance of the trial. But whether this is a matter that must be shown by the party moving the court for a new trial, or the party in opposition thereto, seems not to be fully settled.

The correct rule, however, seems to be that the party filing the motion must show that he had no knowledge of the alleged misconduct during the continuance of the trial; for the reason that this is a matter peculiarly known to himself, and not generally within the knowledge of the opposite party.

The next question to be considered is as to the taxation of the costs. The petitioner insists that they should be taxed against the board of county commissioners, and argues that the commissioners having found that the ditch was necessary, and that it was conducive to the public health, convenience and welfare, that thereby the construction of the proposed improvement became a public matter—one in which the public at large was interested; that this improvement could only be made, in any instance, for the interest of the public, and when conducive to the general welfare; that although a petitioner, his interest as a private citizen ceased when the commissioners granted the prayer of his petition. And that whatever interest he thereafter had in the proceedings, was only as a member of the public at large, and one whom the law might presume to be desirous of seeing carried into successful execution that which he was instrumental in placing in motion. That it was because of this supposed interest in the matter that he was made a party defendant, and not for the purpose of making him an adversary party in the proceedings, and liable to a general law of costs.

There is much force in the position taken by the petitioner and the principle contended for by him.

The difficulty is found in applying this principle to the language found in sec. 4470, Rev. Stat., which provides:

"The probate judge shall receive the verdict of the jury, and make a record thereof, together with all the proceedings before him, and shall thereupon tax the costs in favor of the prevailing party, and against the losing party; if more than one matter is appealed from and a party prevail as to one, and loses as to another, the court shall determine how much of the costs such party shall pay; but the costs on motions, continuances, and the like shall be taxed and paid as the court may direct. If there are several parties, upon the side taxed with costs, the court shall apportion the costs equitably between them. Said judge shall immediately after the trial, make a transcript thereof, certify and transmit the same, together with all the papers in the case, with the bill of costs made in the probate court, to the auditor of the county, who shall thereupon notify the commissioners to meet at the auditor's office within five days from the date of the notice to determine the matters growing out of the appeal and verdict." (78 v. 206.)

The language here found would seem to require in a case like the present, where the county commissioners and the petitioner and defend-

ants are the losing party, that the court should appropriate the costs between them.

The proper construction to be placed upon a statute is often found in the consideration of the statute which it amends or is intended to supply. In this way the intention of the legislative mind may, at least, to a certain degree, be ascertained. I have frequently found it a very good way of arriving at a satisfactory conclusion.

The act of 1871, 68 O. L., 60, seems to have been a codification of the ditch laws up to that time.

Section 6 of that act provides that the probate judge should docket the case "entitling said case the appellant, plaintiff, and the county commissioners, defendant." And further that it was the duty of the appellant to notify the principal petitioner of the time fixed for hearing the cause by the probate judge.

In section 8 of this act it was provided that if the report of the jury be against the appellants, all the costs of appeal shall be taxed against said appellants.

And by section 9, "if the jury shall report against the location of such ditch, the costs made before the commissioners shall be taxed against the principal petitioner." It will be observed that these sections only provide who shall pay the costs of an appeal where the report of the jury is against the appellants.

It is singular that there is no provision as to whom the costs of the appeal shall be taxed, in case the jury report against the improvement. Therefore under the general rule that the costs are to be taxed in favor of the prevailing party and against the losing party, and from the further fact that this statute specifically provided against whom the costs should be taxed in case the jury reported against the appellants, in case the jury reported against the ditch, the county commissioners, the only party defendant, so made by statute, would have been required to pay the costs of the appeal. All that could be taxed against the principal petitioner would have been the costs before the commissioners.

When the statutes were codified in 1880, section 6 became 4464, and it was provided that the probate judge should docket the case, styling the appellants plaintiff and the county commissioners and the petitioner, defendants.

The change made the petitioner defendant, and thus brought him into court, without further notice being required to be given him. And this seems to have been the real purpose for making him a defendant.

For, while he was made a defendant in the case, it was specifically provided by sec. 4471, "that if the jury find the improvement is not necessary, or will not be conducive to the public health, convenience or welfare, or is not practicable, the commissioners shall cause an entry to be made upon their journal dismissing the proceedings at the costs of the county, which shall be paid out of the general county ditch fund, on the order of the auditor."

By the act of 1881, 78 O. L., 204, this sec. 4471, was repealed, and its provisions as to the payment of costs embodied in sec. 4470 and 4472 amended in their present form. Until the law was amended in its present form, there was no question but what the costs of a ditch appeal, in case the jury found against the decision of the county commissioners, would have had to have been paid by the county. Section 4470 as now amended provides how the costs should be taxed in all cases of ditch appeals. You

may say it is the general law upon that subject, a gathering up of a number of separate provisions into one systematic whole.

Until sec. 4470 was made in its present form there was no discretion as to how the costs should be taxed where the jury might on some of the four questions find in accord with the decision of the commissioners and on others not. The jury might find that the ditch is conducive to the public health, convenience or welfare, and that the route thereof is practicable, but upon the question of compensation and damages it is quite probable that upon one or the other, or both, where there were a number of appellants, the verdict of the jury might not agree with the decision of the commissioners.

There might be a number of instances where upon some one of the four questions, there would be two or more parties upon the side taxed with costs. But unless it is held that the petitioner is liable, under this amended section, to a part or all of the costs, in a case like the one at bar, section 4470 makes no new party liable for costs.

A defendant petitioner is nowhere specifically made responsible for costs. In making such a general provision, it is fair to presume that the legislature, in the absence of a contrary specification, did not intend to change the law, and make a new party liable.

It was hinted in *Miller v. Weber*, 1 Ohio 'Circ. Dec., 77, that there was a doubt whether a petitioner defendant in a ditch appeal is an adversary party.

Taking all these facts into consideration, the apparent reason why the petitioner was made a party defendant, the fact that it was never anywhere specifically provided that he should pay any of the costs in a ditch appeal, but that on the contrary it was provided that the county should pay them, the doubt whether he is an adversary party or not, the peculiar nature of the proceedings, the interest of the public in general therein, I am inclined to believe, although not entirely free from doubt, that where the jury in a ditch appeal find against the ditch the costs of such proceedings must be taxed to the county commissioners.

Of course, this would not include costs of motions, continuances, etc., but as in the present case the petitioner has born all the expenses of procuring counsel and preparation of the case, such costs will be held to follow the other costs in the case.

EXECUTORS.

[Clark Probate Court.]

IN RE H. SULTZBACH.

1. Under sec. 5995, Rev. Stat., where a will is duly proved, it is mandatory upon the court to appoint the person therein named if he is legally competent, and offers proper bond if required.
2. A person named in a will to act as executor, who is not a minor, a lunatic, or an idiot, upon tendering a proper bond must be appointed as such executor.
3. The fact that the person named as executor in the will is antagonistic to a large number of the legatees, and that his interests are antagonistic to theirs, does not afford the court sufficient reasons for refusing to make such appointment.

ROCKEL, J.

On January—, 1893, the will of Catherine Sultzbach was regularly and properly probated in this office. Thereupon Howard Sultzbach, the

person named in the will as executor, made application in the regular manner to be appointed as such. To his appointment six or eight of his other brothers and sisters protested, because, first—That he is incompetent to perform said trust. Second—That from his lack of capacity and business knowledge in regard to the estate of the late Catherine Sultzbach, he is unfit for said trust. Catherine Sultzbach died the owner by devise from her husband of about 335 acres of valuable land in this county. She was the mother of thirteen living children. She was seventy-seven years of age when her husband died, and eighty-three at her death. From the time of her husband's death until her own, she lived on the home farm with Howard, who was unmarried and her youngest son, and her two daughters, Elizabeth Sultzbach and Mrs. McLean, a widow. To these three children she gives in her will about 138 acres of the most valuable land, with the valuable improvements thereon, Howard receiving fifty acres. The remainder of the farm she wills to her remaining ten children, making it subject, however, to the payment of all her late husband's debts as well as her own. These debts are nearly equal to the value of the lands devised to these ten children.

All the children residing in this state but Howard, Elizabeth and Mrs. McLean, are resisting the appointment. The three residing elsewhere, do not appear to have been heard from. Some three or four of the protesting children, while not imbeciles or idiots are certainly in a condition that it would seem that a mother who had born them from her womb, nursed them in infancy, and cared for them in childhood, would not, uninfluenced and of her own free will, have left them in want, and provided for others who are able, both mentally and physically, and financially, to take care of themselves. Such an act is not natural. Such a deed it is hard to believe comes from a mother.

But this will has been regularly proved and admitted to probate in this court; and however much I may doubt its justice, or its genuineness, so far as this proceeding is concerned, I am bound to consider it a legal instrument and presume it to be the valid last will and testament of Catherine Sultzbach. And this is true even if a contest to test its validity be now pending. Section 5995, Rev. Stat., provides: "When any will shall be duly proved and allowed, the probate court shall issue letters testamentary thereon to the executor, if any be named therein, if he be legally competent, and if he shall accept the trust, and shall give bond, if bond be required, to discharge the same; otherwise, the court shall grant letters of administration upon the estate as hereinafter provided."

In considering this statute in reference to its application to the case under consideration, two questions arise.

First—If the person named is legally competent, is it mandatory upon the court to appoint him as such executor?

Second—What is meant by legally competent? It seems, so far as my investigation has extended, that if the person named in the will is legally competent, the court is without discretion, and must make the appointment. In *McGregor v. McGregor*, 40 N. Y., Denio, C. J., says: "The selection of an executor is not committed to the surrogate's court. The testator is allowed to appoint such persons as he may see fit, provided they do not fall within the class of incompetent persons mentioned in the statute." Johnson, J., in the same case says: "The statute makes it the duty of the surrogate when any will shall have been admitted to probate, to issue letters testamentary thereon. It then provides who shall be deemed incompetent to serve as executor. I am of the opinion

that any person appointed or named as an executor in a will is to be deemed competent, unless he is declared incompetent by statute, and that it is the duty of the surrogate to grant letters to every person named in a will as executor, upon his application, who is not declared incompetent by statute. He had no discretion in the matter, but must obey the requirements of the statute, which is the sole source of his power."

In *Berry v. Hamilton*, 12 B. Mon. (Ky.) 191, the court takes the same view when it says: "It is sufficient for us to say that the law has declared who may and who may not be executor, and—if Berry be a man whom the law allows to be appointed as such, it follows that upon his motion to give bond and security and to qualify under the will, it was the duty of the court, if the security was sufficient, to permit him to give bond and be qualified as executor, and to give him letters testamentary. * * * Whatever may be the opinions of men as to the propriety or impropriety of a particular appointment, the very basis and foundation of the exercise of the right which society has granted to its members to appoint its own representative after death, is the special confidence reposed by the testator in the appointee; and men, it seems to us, would care but little for the high privilege of disposing of their own estates to their own liking if they are to be denied the right of selecting those who are to carry out and effectuate the benevolent purposes of their wills. The law has pointed out who they are, and society has long been satisfied with the wisdom of the rules upon this subject."

In *re Banquier's Estate*, 26 Pac. R., 179. (Cal. Sup. St., 1891), it is said: "Under our law, a man has the right to make such disposition of his property as he chooses, subject only to such limitations as are expressly declared by law, and within the same limitations he has the absolute right to select the executor to carry out his will. In other words, any executor named in the will has the right to act, unless there is some express provision of the law which declares he shall not."

Likewise in *Holladay v. Holladay*, 19 Pac. R., 81, (Ore. Sup. Ct., 1888), it was held "That when a will is proven, it is the plain duty of the court to grant letters testamentary to the person named in the will, upon his application, who is not disqualified by statute."

In some few states the law has vested a wide discretion in the court, but in the cases above quoted from, the statute was very much like the one in Ohio, and I feel that they state the law as it should be applied here, and will therefore hold that under sec. 5995, Rev. Stat., where a will is duly proved, it is mandatory upon the court to appoint the person therein named if he is legally competent, and offers proper bond if required.

The next question is, who are excluded by reason of not being legally competent? What is meant by this expression? The statute has been in force for more than half a century, and I have been unable to find any reported decision. The legislature has said in sec. 6001, Rev. Stat., that a minor shall not be appointed, but that some one shall be appointed to act until he is of legal age. Section 6022, Rev. Stat., provides, that if an unmarried woman is an executrix and marries, this extinguishes her authority as such. These are the only two provisions throwing light upon what the legislature concludes is a legal incompetency.

We are thus driven to the common law in the absence of statute, to ascertain what meaning should be attached to "legally competent," and who there was considered competent to act as executor. At common

law, such was the respect in which the wishes of the testator were held, that in the appointment of an executor to stand in his place and settle his estate, the principle was sometimes carried to the extent of appointing persons obviously unsuitable to exercise the trust. (Schouler's Ex'rs., 133.)

Generally speaking, says Williams on Ex'trs., 268, all persons capable of making wills, and some others besides, are capable of being made executors, hence immorality or habitual drunkenness did not disqualify. "So that" says the court in *Holladay v. Holladay*, *supra*, "in the absence of statute, we find that aliens, minors, married women, criminals, immoral persons, habitual drunkards, insolvents, and other obviously unsuitable persons were not disqualified by the English law, and that the rule was, as already stated, that all persons may serve as executors except such as are expressly forbidden." * * * "The common law forbade the appointment of an idiot or lunatic or insane person, for these disabilities render them incapable of performing the duties of such trust, but their want of understanding likewise rendered them incapable of determining whether they would accept the trust.

"These references are sufficient to show how few are disqualified to act as executors at common law, and how strictly the wishes of the testator were regarded and enforced in his appointment of a representative to manage and control his estate after his death. In fact, there seems to have been no discretion left the court in the matter; if the person named did not come within the inhibited class, the court had no right to refuse his application." It will thus be seen how few are the causes which will permit a court to use its discretion and not appoint a person named in a will, as the executor of such will.

It seems that if he is not a minor, a lunatic, or an idiot, upon tendering bond he must be appointed. It would seem to me that a married woman would likewise be entitled to the appointment, were she named in the will. It will be conceded, without reviewing the testimony offered, that Howard Sultzbach is neither a minor, a lunatic, or an idiot.

It has been sought to impress the court that the fact that the executor was antagonistic to the large majority of the legatees and that his interest was antagonistic to theirs, ought to have some bearing in the matter.

Upon this matter, *In re Banquier*, *supra*, is an important case. The law in California provides, that "the want of understanding or integrity" is a disqualification to act as an executor. The court there having jurisdiction of such matter found that Mary C. Bode "is incompetent to execute the duties of the trust of executrix of the said last will and testament of said Joseph Banquier, deceased, for want of integrity, and that the said Mary C. Bode is antagonistic and hostile, and asserts claims adverse to the said estate, and that she wants integrity in that regard."

The Supreme Court of California, 26 Pac. R., 178, upon passing upon this case, and reversing the decision of the lower court, says, that this was not a sufficient reason for refusing her the appointment.

And in reference to the weight of evidence which would justify such refusal, conclude: "We may add, while the court is authorized to refuse to appoint an executor named in the will for want of integrity, yet for manifest reasons this power should not be exercised, except upon clear and convincing evidence establishing such disqualifying fact."

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Section 6017, Rev. Stat., seems to give this court a very broad discretion in the matter of removal of an executor, when after alluding to a number of specific causes of removal, it says, "or any other cause which in the opinion of such court renders it for the best interest of the estate that such executor or administrator be removed."

But as to the appointment its power is limited within very narrow bounds.

It is not impossible but that the legislature recognized this fact when sec. 6019a, Rev. Stat., was enacted, and therein provided that during the contest of a will the executor would have no right to control real estate specifically devised.

The application in this case will be granted, but the executor will be required to give bond, although the will dispenses with it. And I think it proper that the costs of this application be taxed against the real estate.

Cochran & Rodgers, for executor.

Mower & Mower, for protestors.

RECEIVERS—PROCEEDINGS IN AID OF EXECUTION.

[Clark Probate Court.]

HAYES, GREEN & CO. V. D. E. MOORE ET AL.

1. Before a court will appoint a receiver under the provisions of sec. 5484, Rev. Stat., it must be shown that the debtor has fraudulently transferred his property to others, who hold and claim to own the same, and it further appears that if a receiver were appointed who would pursue the persons claiming such property, in a court of competent jurisdiction, that there would be a strong probability that he would recover something which could be applied on the creditor's judgments.
2. A person largely indebted cannot give away his property without amply providing for the payment of his debts. Such a gift is never upheld unless property is retained, clearly and beyond doubt sufficient to pay all the donor's debts.

ROCKEL, J.

The evidence in this case fails to disclose any property in the possession of the defendant to which he claims ownership, or any property in the possession of others belonging to him, but what the person in possession claims ownership.

The evidence, however, does disclose the fact that after the indebtedness of the plaintiff was incurred, that the defendant took out stock in various corporations in the name of his daughters, and that for a nominal consideration he sold some of his property to other persons. The question therefore is, whether the evidence adduced is sufficient to warrant the appointment of a receiver to recover the property thus claimed to have been fraudulently transferred, and convert the same into money and apply it to the satisfaction of the plaintiff's judgment.

Judge Okey, in *White v. Gates*, 42 O. S., 109, at page 112, lays down the law very succinctly to govern this kind of a proceeding when he says: "And the claim of Mrs White, that the money was a valid gift from her husband, was one which she was entitled to have tried, in regular form, by a court of equity, clothed with authority to hear and determine as to the rights of the respective parties, and to enforce the decree in the manner usual in such courts. The proceeding in the probate court

was not such suit, or a substitute for it, but a proceeding summary in its character, in the nature of a proceeding *in rem*, designed to appropriate the property of a judgment debtor, in the hands of a third person, to the payment of the judgment, where the person having possession of the property asserts no claim to it, and voluntarily assents to such appropriation. And while the judge may order the person having the property to deliver the same to a receiver, although the person so having possession claims to own it, the judge has no power to enforce the order as for a contempt, however plain it may seem to him that such claim of ownership is wholly unfounded; but the receiver must resort to the ordinary remedy by action. In so holding, we are supported by *Union Bank v. Union Bank*, 6 O. S., 254; *Edgerton v. Hanna*, 11 O. S., 323."

This court therefore having no right to enforce any order except by action at law, that might be made herein upon persons claiming property in their possession, and having no power to adjudicate upon the rights existing therein between them and the defendant, D. E. Moore, the question presents itself whether the evidence adduced in this court, in order to warrant the appointment of a receiver in such cases, must be such that if presented to a court of competent jurisdiction having power to adjudicate and determine the rights in and to the property existing between the said D. E. Moore, defendant, and his said daughters to others, would warrant such court of competent jurisdiction in finding that such property was fraudulently transferred, and rightfully as to these creditors belonging to the defendant: Or whether it would be sufficient if the evidence showed a strong possibility that such transactions were fraudulent.

It seems to me that a strong probability will be sufficient. Of course, the order ought not to be lightly made. The court ought to believe that if the receiver would pursue the persons claiming the property, in a court of competent jurisdiction, that there would be a strong probability that he would recover something which could be applied on the plaintiff's judgment.

The plaintiffs in such cases having established the justness of their claim in a court of justice, ought to be enabled, through the receiver, to recover any property of the defendant, and apply the same to the satisfaction of their claim.

Such would seem to be the true spirit and just design of the statute under which these proceedings are brought. Is the evidence, then, in this case sufficient to warrant the appointment of a receiver?

In the latter part of January, 1891, the plaintiffs and defendants were in partnership in the fruit commission business in Springfield, Ohio. They dissolved partnership in January of that year, to take effect on the ninth of the following February.

The plaintiffs received, among some other things, as a part consideration for their interest, the defendant's notes for some six hundred dollars, one hundred of which, being the first note due in ninety days after it was made, was paid. Some of the remainder of these notes were not paid, and constitute the foundation for the judgment in this cause.

Among other things the plaintiffs transferred to defendant, D. E. Moore, when the partnership was finally dissolved on February 9, 1892, was \$1,000 of stock in the East Tennessee Land Company.

D. E. Moore continued in business until June, about four months, when he quit, \$1,500 in debt. He says he lost the money, but in what particular way the evidence does not disclose.

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Within a month after Moore bought out the plaintiff, he surrendered this stock of the East Tennessee Land Company and had it re-issued one-half, to-wit: \$500 to each of his daughters, Tillie and Dora.

Moore testifies as follows, in reference to this transfer: "Q. What was done with that stock in the East Tennessee Land Company? A. I let my daughters have it. Q. Now, then, what do you mean by that 'I let my daughters have it?' What do you mean by that, did you give it to them? A. Yes, sir. Q. What daughters did you give it to? A. To Tillie and Dora."

It appears on cross-examination of the defendants and the daughter, made eight days afterwards, that this stock was given to the daughters to pay them for work done at their home.

Transfers of this kind between members of the family are always closely scrutinized. It may be true that the transaction was all fair and just, but it is suspicious.

According to their own testimony, no express contract was ever entered into as to how much per day, week or year they were to have for such services—no account was ever made or kept by them against their father. They were still at home, as they always had been, receiving its advantages and comforts.

Tillie still has her stock; Dora, when her father asked her for her's, without any consideration or security for its return, gave it to him, and he pledged it to secure a debt due on some fixtures he was using in his business; this adds more suspicion.

We next find that at about the middle of May, following, the defendant purchases \$1,000 worth of stock in the Pine City Lumber Company, of Georgia. This stock is also taken out in the name of his daughter, Dora. It was paid for largely, as Mr. Painter testifies, by Mr. Moore in produce from his commission house. There is nothing in evidence to show that Dora ever paid anything for this, or that she has any claim on it other than as a mere gift to her. A little while after this, we find, that Moore sells the horses, wagons, etc., used in the business, and worth perhaps \$400 and \$500, for one dollar, to one Rubsam, upon the understanding that Rubsam was to give them back to Moore, whenever he, Moore, wanted them.

This was the boldest kind of a fraudulent transaction, and one deserving the severest censure from a court of justice. It is sufficient in itself to cast a cloud of suspicion over all the transactions of the defendant in the disposal of his property.

At the very time he thus transferred this stock to Rubsam, he knew he owed this plaintiff \$500, with not a dollar's worth of property remaining in his hands to pay it.

When Moore first was called in court in this case, Rubsam still had these horses. Since that time, and before the nature of the ownership of Rubsam was developed, the horses have disappeared, even to the knowledge of Moore. It seems that Rubsam's honesty is about on a par with Moore's.

From the books which are in evidence but upon which little reliance can be placed, from the fact that neither the defendant nor counsel are able to tell anything about them, it appears that at the time Moore purchased plaintiff's interest in January, 1891, the firm was worth \$2,792.43.

There is no evidence that Moore had any other property than his interest in this firm, which it is fair to presume was equal in value to what he paid plaintiffs for their interest, to-wit, about \$1,200. After he

had purchased plaintiffs' interest, he continued the business about four or five months. During that time he had placed \$500 of the East Tennessee Land Company stock in his daughter Tillie's name; \$500 of the same stock and \$1,000 of the Pine City Lumber Company, of Georgia, in Dora's name, and, for \$1, transferred \$400 worth of horses, etc., to Rubsam; in all \$2,400.

Is there any wonder that when he quits he was \$1,500 in debt. In *Crumbach v. Kugler*, 2 O. S., 373, it was held that, "A person largely indebted cannot give away his property without amply providing for the payment of his debts. * * * Such a gift is never upheld unless property is retained, clearly and beyond doubt sufficient to pay all the donor's debts." Treating all these transfers as gifts, the defendant did not retain sufficient property to begin to pay all his debts. Treating them as sales, the evidence very strongly indicates that they were made to hinder and defraud Moore's creditors, and thus, under the Statute of Frauds, are void. A debtor must be just before the law will allow him to be generous.

We next find Mr. Moore, in December, 1891, engaged in the fruit commission business again, under the name of D. E. Moore & Co., Agent.

The active persons in this firm were the defendant and Rubsam, the person to whom he had previously for \$1, transferred the horses, etc. They claimed that they were doing business for Stella Moore, another daughter of the defendant.

But Stella Moore put nothing in the business, nor did anything about it. It was in fact the business of D. E. Moore. All that Rubsam put into the business was the horses and wagons, which were given him for the nominal consideration of \$1.

The fixtures that were in use were paid by Dora's \$500 of stock in the East Tennessee Land Company.

These fixtures are yet undisposed of. Nobody seems to claim them, Moore testifying that they belong to the Fruit Commission Company, and Harris of that company, saying that they held no claim on them, etc.

The evidence of Mr. Moore in reference to all these transactions is extremely vague and indefinite. It shows a want of knowledge with his business that is not explained. He has either been duped himself, or has been and is seeking to dupe others. The court is of the opinion that the evidence is sufficiently strong in this case to warrant the appointment of a receiver to collect whatever may be collected on this stock now held by the daughters Tillie and Dora, the horses, etc., held by Rubsam, and the fixtures in use lately by D. E. Moore & Co., Agents, and an order will also be made directing the parties now holding such stock, etc., to turn them over to the receiver.

It will also be ordered that within ten days the plaintiffs give security for costs in the sum of \$50.

Summers & Beard, for plaintiff.

J. L. Zimmerman, for defendants.

EXECUTORS—SETTLEMENT OF ESTATES.

[Hamilton Probate Court.]

*** IN RE ESTATE OF HENRY WORTHINGTON, FOR REMOVAL OF EXRS.**

1. The executors of a will were given power to manage the estate "as fully and completely as if they were owners absolutely and in fee simple" and "all and everything else which in their opinion may be proper to be for the benefit of said estate." An agreement was entered into between the executors, legatees and creditors, by which, among other stipulations, certain property was to be turned over to a creditor. This agreement was held valid by the Kentucky courts, and under it the executors have borrowed money to pay the other creditors, and all outstanding debts have been paid, and it is in evidence that the agreement has been beneficial to the estate. The above creditor alone now objects to the settlement on the ground that under it no merchantable title could be given him until a final settlement, and that the executors had no power under the will to enter into this agreement : *Held*, that the creditor cannot now object to the agreement.
2. The policy of the law favors settlements, in order that there may be a speedy adjustment of legal controversies, and the courts have adopted that plan as a desirable conclusion in the settlement of estates.

FERRIS, J.

This application is made under and by virtue of the provisions of sec. 6017, Rev. Stat., which provides: "The probate court may at any time remove any executor or administrator, he having twenty days' notice thereof, for habitual drunkenness, gross neglect of duty, incompetency, fraudulent conduct, removal from the state, or that there are unsettled claims or demands existing between him and the estate, which in the opinion of the court, may be the subject of controversy or litigation between him and the estate, or persons interested therein, or any other cause which in the opinion of such court renders it for the interest of the estate that such executor or administrator be removed, and the other executor or administrator, if any there be, may proceed in discharging the trust, as if the executor or administrator so removed were dead, and if there be no other executor or administrator to discharge the trust, the court may commit the administration of the estate not already administered to some other person or persons, in like manner as if the executor or administrator so removed were dead."

Contention has been made that the court should order the removal of these executors, for the reason that there are unsettled claims and demands existing between them and the estate of which they are the executors, and further, generally, that their conduct in the administration of the estate has not been in accordance with the provisions of the statute.

The testimony taken at length in the case would justify the conclusion that the administration had not been had in all respects in accordance with the strict letter of the statute of the law regulating, directing and controlling the conduct of executors and administrators. But the evidence here adduced makes it necessary for the court to examine carefully into the condition of the estate for the purpose of determining whether or not there has been a legal administration. For it appears that a full and complete settlement and agreement was entered into by and between all of the parties, endeavoring to close up and adjust all of the unsettled matters between the various parties in interest, known as

*For former decision in this case see 4 Dec., 381.

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the agreement of May 4, 1896, set forth as Exhibit "B" in the testimony.

The last will and testament of Henry Worthington gave unusually broad powers to the trustees, and fully authorized them to exercise the widest possible latitude of discretion in the matter of the adjustment and settlement of all questions relating to that estate. For clause 14 of the will says: "It is my will and I do hereby authorize and empower said George G. and J. Carroll Hamilton, as trustees, to manage and control the said residue and remainder of my estate which may come into their hands under the provisions of this my last will and testament, as fully and completely as if they were the owners absolutely and in fee simple, with full power, during the life of said trust, to sell, convey, exchange, rent, lease, build houses, etc., and all and everything else which in their opinion may be proper to do for the benefit of said estate, and shall make a full and complete settlement of all their transactions as to the said estate, to the court having jurisdiction, at least once in a year."

The exceptor, a son of the deceased, besides being a legatee under clause four of the will, is also a large creditor of the estate, evidenced by a promissory note against which no contention is made, and it is a valid indebtedness of the estate.

For the purposes of adjusting said claim, an agreement was entered into between Henry S. Worthington, the executors of the estate, and as individuals, and all of the legatees and distributees of said estate, by which it was provided in the ninth clause of said agreement, as follows: "The executors are to administer the estate so as to pay the debts of the estate as soon as may be practicable. Among the debts is a liability to H. S. Worthington, aggregating about \$70,000. In payment of \$8,500 of this, he is to be deeded the Heno farm, subject to the lease thereon, but the executors are to retain therein a right to redeem same by payment to him of \$8,500 within five years, and in payment of the balance of said indebtedness, he is to be deeded the Fern bank property, in Ohio, which is not included in the lease from Kinkead, and is to immediately execute to the executors, a lease upon it for a term of five years, at a rental of six per cent. per annum on that amount, with privilege of purchase by payment to him of the same amount of said balance and unpaid rentals then due, containing the same privileges and covenants, as shown in the lease from Kinkead to Short.

"When all the debts and liabilities now remaining against the estate of H. Worthington, have been paid (the Gaff lease, the H. S. Worthington debt, herein named, and the Casey liability not being computed as debts for the purpose of this paragraph,) the conveyance of the Lucas county property, above provided for, is to be made to Lily W. Stuart or her assigns, as hereinbefore stated.

"When all the debts and liabilities against the estate have been paid, except the redemption of the Gaff and H. S. Worthington leases, the remainder of the estate of H. Worthington (including the estates of Maria Worthington and Mattie Worthington), after deducting \$10,000 to Kearns Worthington, and the Tennessee land and item 11, herein, is to be divided between Lily W. Stuart and Roberta Hamilton, one-half each, except as provided in item 10: and if the property then to be divided is on hand in kind, to be divided at the curator's valuation thereof. But it is expressly understood, that if the Casey liability has not been adjusted or finally determined by the time the other liabilities of the estate are paid as herein provided for, the partition contemplated and provided for in this paragraph, is not to be postponed. It is expressly understood

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and agreed, that nothing is to be paid or conveyed to Lily W. Stuart, under items 7 and 9 hereof, until she shall exhibit and file with the executors, George C. and J. C. Hamilton, an acknowledgement of satisfaction from S. Worthington of the price, to-wit, \$50,000, for which he has, and hereby agrees to sell his interest as herein recited, to Lily W. Stuart, or they shall otherwise be satisfied thereof, but said executors are to hold the same in trust to secure said amount to said H. S. Worthington."

It was further provided, in sec. 20 of said agreement, as follows: "This agreement and compromise of settlement is not to be effectual until it shall, in an appropriate proceeding in the Kenton circuit court, have been ratified and authorized by a judgment in that court, all parties in interest being parties thereto, said proceedings to be instituted immediately upon the execution hereof by the parties hereto, and prosecuted vigorously to a conclusion; the costs of same to be paid by the estate, but the attorneys by the individuals they represent. An appeal to the court of appeals shall be taken at once, and the case advanced and affirmed as soon as may be practicable."

Which agreement, being duly signed by all of the parties in interest, was signed by H. S. Worthington, with this expression: "I agree to and accept all the terms and conditions of the above agreement and compromise, and will do and perform all things required of me."

"(Signed) H. S. Worthington. May 4, 1896."

The testimony shows that the executors proceeded, in compliance with the above agreement, to close up the estate in accordance therewith, and no creditor is here objecting, except H. S. Worthington, who now urges that this contract is ineffectual in the settlement of the estate, for the reason that no title can be given to him that is merchantable and legal, because all of the debts due and owing from the estate of Henry Worthington, deceased, are a lien upon the property until paid; that no title of the character in contemplation at the time of the making of the contract, could be made to him until a full and final settlement of the estate was had.

It is in testimony, that the executors of the estate proceeded under the advice of counsel and under the authority given to them by the courts of Kentucky, having original jurisdiction in the settlement of the estate, to close up this estate in accordance with this contract of agreement, under which contract it is claimed by them, that, so far as H. S. Worthington is concerned, he can not be heard to complain, for the reason that the settlements made, the contracts entered into by the executors, and their proceedings have been entirely in consonance with, and in full performance of the agreement of May 4, 1896, and it is not contended by them, that in view of this agreement they are to close the estate under the Ohio law in a statutory way.

It is admitted that, by virtue of the power vested in and conferred upon them by the terms of the last will and testament of Henry Worthington, deceased, they did proceed to contract with certain corporations for the purpose of raising a sufficient amount of money to pay off and to discharge all of the indebtedness due and owing to all of the Ohio creditors, who were by them paid in full of all account.

The testimony warrants the conclusion that there is no outstanding indebtedness at this time. Demand is made that the acknowledged claim of H. S. Worthington should be paid as other indebtedness has been paid, and here the main contention has arisen to be disposed of by this court, as to whether the contract that was entered into, as herein set forth, is

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legal and of a binding nature, and sufficient in law to justify the line of action pursued by these executors. The will of Henry Worthington was never intended by this agreement to be abrogated or set aside. This agreement of May 4, was had specially with reference thereto, and, unless the powers delegated to the trustees and executors would fully warrant the entering into such an agreement, the contract must fail. But, if it shall be found that the powers conferred are of sufficient breadth to cover a transaction of this kind, much light would be shed upon the transaction by an examination of the will itself.

The will, as a whole, is not ambiguous nor difficult to understand. The courts of Kentucky, from the lowest to the highest court, found it to be the valid last will and testament of Henry Worthington, and also by decree affirmed the contract of settlement of May 4, 1896. The will authorizes and empowers the trustees "to manage and control the estate under the provisions of this, my last will and testament, as fully and completely as if they were owners absolutely and in fee simple, with full power during the life of said trust, to sell, convey, exchange, rent, lease, build houses, etc.," and then, as if to cover a case where discretion was to be exercised, the testator adds: "And all and everything else which in their opinion may be proper to be for the benefit of said estate, and shall make a full and complete settlement," etc. It was under the supposed authority that was given here, that the agreement of May 4, 1896, was entered into, and while such a contract would not be binding upon one not a party to it, it is urged that the authority to make such an agreement—no one complaining but a party to it—is full and ample in any proper construction of this clause of the will.

This, the courts of Kentucky, after fullest consideration, determined was the law of the land, and it is urged that, if there was no other reason for the denial of the present motion, it would be found in that fact alone, namely, that a court of original jurisdiction in an action at law between the same parties, over the same subject matter, concluded that the contract of May 4 was in full force and effect, and binding upon all of the parties thereto, and that it was made by and between persons, who, in their individual and representative capacities, were by the law fully authorized to enter into, and carry into effect, the agreement of May 4, 1896.

But, irrespective of the claim of *res adjudicata*, counsel for the estate of Henry Worthington contend that it was for the best interests of the estate that a settlement should be had in accordance with the facts existing at that time, to the end that the object of all administration of estates everywhere, and particularly of this estate, should reach a solution at an early date, and, for that reason, it was deemed best by them in the exercise of the discretion given to them under the will and sanctioned by the laws, to proceed forthwith to the payment of indebtedness, and prepare at the earliest possible date for a proper distribution of the effects held by them in trust both for the creditors of the estate, as well as for the distributees. To that end it was possible by the conveyance of certain lands mentioned in the agreement to H. S. Worthington, and the payment of the indebtedness due to creditors of the estate, to effect a satisfactory adjustment of all outstanding matters.

If the agreement were void, the plain course to have been pursued by the executors was an immediate sale of the most available assets and a distribution of the same under the orders of this court. The executors say, as reflecting upon their discretion, as exercised in the manage-

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ment of this estate, that the agreement set forth was most advisable in this, to-wit: That it gave to them an opportunity to sell the property at such times and in such manner as circumstances might indicate and direct without serious loss; that if forced to sale within the time provided by law, the property would have been sacrificed and great loss, consequent upon such action: that the times were not propitious for an advantageous sale, and that, acting under the best counsel possible, it seemed to be a wise and discreet plan to convey to their largest creditor, at proper valuations, a sufficient amount of property to satisfy his just demands against the estate. And, as a further reason, it is made to appear that much of the litigation arose on account of this claimant. It was proposed and thought, that by the arrangement in question, there would be an end also of this.

By this agreement, also, a way was prepared by which all of the creditors of the estate could receive their money at once and thus end the possibility of having the estate subjected to sale at a time when there was no market for the property. To this end it has appeared that the executors have also jeopardized their own personal estates, for the time being, to assist in discharging the indebtedness of the estate of Henry Worthington, and while it is true that members of their families are the largest beneficiaries, yet, the argument loses none of its force when it is shown that the creditors of the estate have been benefited by the transaction. There are no creditors, as the court has said, complaining of the transaction, except H. S. Worthington, a party to the contract, and unless the argument of his counsel, that the contract is illegal, should be found effectual, the contract ought to stand as the basis of settlement of the estate. The ground for its rescission is, that the executors were without power to enter into it, and that in legal contemplation it was impossible of execution. Insuperable difficulties, if true.

That H. S. Worthington was a creditor is not denied. That he had a valid claim against the estate at the time of the entering into the contract is unquestioned. That it was the legal duty of the executors, aside from the contract, to appropriate assets to the payment of this indebtedness, is equally true, and, if the personal assets were insufficient, then to subject a sufficient amount of the realty to the payment of said indebtedness.

This could have been done by appraisal and sale, either public or private, and the estate being, as shown by the testimony, solvent, there could have been no objection in law to a private sale to H. S. Worthington, the consideration of which being the cancellation and complete liquidation of his claim against the estate; or, no rights of creditors intervening, an agreement could have been entered into between the executors of the estate and the claimant, by which his indebtedness could have been postponed as an entirety, or paid as an entirety either in moneys or equivalents.

The contract, as the court understands it from the testimony, was made with the fullest understanding by all of the parties, particularly H. S. Worthington, of the condition of the estate. He was familiar with its assets and liabilities. He was familiar with the fact at the time of the indebtedness that was outstanding. He knew, as is shown by the contract, that there were other debts to be paid, for the particular clause which refers to his interest (Item 6,) says, that the executors are to administer the estate so as to pay the debts of the estate as soon as may be practicable. How, then, could he be heard to complain at this time

In re Estate of Worthington.

that no merchantable title could be given as long as the indebtedness was due and unpaid ?

It is here to be admitted, that the claims of creditors are first and prior as against heirs and distributees, but it is also true, that, having provided for payment for the liquidation of all indebtedness, the argument fails for want of application. The executors have tendered to H. S. Worthington deeds in compliance with the contract, and stand ready to fulfill all and singular, the obligations called for by the agreement. H. S. Worthington can do no less. He stands before this court calling for the strict performance of a statutory duty on the part of the executors, the performance of which has been prevented by his own act. Rights have ensued as the result of these contract relations. Engagements have been entered upon by third persons, who, it is true, are charged with the knowledge of the law, but who, in good faith, on the strength of this contract, have loaned money to the estate to be used by the executors in the payment of indebtedness, and whose rights are reciprocal, and the performance of which agreements must be carried out by the officers of this court in good faith; and, for that reason, no claims of equity can be heard when the voice of the law is as distinct as could be heard, speaking through a contract that appears to the court plain and unavoidable.

The Lucas county transaction furnishes illustration of the principles above referred to, and, while the doctrine of subrogation possibly might apply to the insurance companies that have loaned money to pay off the creditors of the estate, yet it does not seem to the court a proper case for the application of that doctrine.

As the court has heretofore remarked, an entirely different course would have been pursued, were it not for the contract of May 4, 1896. That these officers, whose acts are now called in question, fully intended to administer the estate in accordance with the statutes of Ohio when appointed, and that statements to that effect were made in open court, there is no doubt. That the court ordered the parties to proceed in accordance with the statute to close up the estate at the earliest possible date, to the end that the Ohio creditors should be paid with the Ohio assets, there can be no doubt, and, in the absence of such an agreement as herein made, there can scarcely be any excuse, and certainly no reason, for a failure to close the estate in accordance with law.

But, in the presence of the agreement upon which counsel rely, the court is of the opinion that the contract is binding, and is to be recognized as one of the methods of discharging an indebtedness. The policy of the law favors settlements, encourages compromises, and welcomes the solution of legal difficulties by amicable means, and when brothers and sisters, heirs and devisees, unite in an instrument whose sole purpose is an adjustment and settlement of all disputed matters, to the end that there may be a speedy termination of all questions in controversy, our courts have invariably adopted that plan as a desirable conclusion in the settlement of estates.

SEWER ASSESSMENTS.

[Hamilton Common Pleas, 1897.]

CINCINNATI (CITY) FOR USE OF WILSON & STRACK V. FUGMAN ET AL.

1. While "making" a street might include the laying of a sewer in it, if the circumstances made a sewer a necessary part of its construction, yet the laying of a sewer is not *per se* the "making" a street, within the meaning of sec. 2283, Rev. Stat.
2. It would seem that within five years three assessments, each for twenty-five per cent. of the value of the property, might be levied to cover the cost of improving a street by grading and paving, by constructing a sidewalk, and by laying a sewer.
3. Where an assessment is found to be excessive and is reduced by the court, no penalty should be recovered, for at no time did the defendant owe the amount claimed, and was justified in resisting its collection.
4. It is immaterial that the sewer is of no actual benefit to the property assessed, the exercise of the power to construct the sewer and to levy an assessment for the cost presupposes the question of benefits to have been determined.

HOLLISTER, J.

These cases are brought to enforce the payment of a sewer assessment of \$2 per front foot of the respective properties of the several defendants, abutting on the street in which the sewer was built. The proceedings resulting in the assessments were all regularly taken under the statutes authorizing the construction of sewers and an assessment for the cost thereof, not exceeding \$2 per front foot. It appears that the same street was improved by grading and paving in 1890, and the proceedings to improve by the construction of the sewer were instituted in 1893, and the sewer was laid in 1894. —

The defendants claim that the effect of these separate proceedings is such as to bring the case within the operation of sec. 2283, Rev. Stat., which provides that "Special assessments, whether by the feet front or otherwise, shall be so restricted that the same territory shall not be assessed for making two different streets or avenues, within a period of five years, in such amounts that the maximum assessment herein provided will be thereby exceeded * * *."

The "maximum assessment" referred to, is that prescribed by sec. 2271, Rev. Stat., which for any improvement "shall not * * * exceed twenty-five per centum of the value of such lot or land after the improvement is made." The broad claim is made that a sewer improvement is a street improvement, and that abutting lands cannot within five years be assessed both for improving the street by grading, etc., and by improving it by constructing a sewer in it, where the cost of both exceeds 25 per cent. of the value of the land, as in this case.

This court held in the case of Nitzel v. Village of St. Bernard, 3 Ohio Dec., 703, that "sewers are street improvements," under secs. 2264, 2935, 2696, Rev. Stat., and Hartwell v. R. R. Co., 40 O. S., 155, and so

they are a kind of improvement. An examination of the statutes discloses that under Chap. 4, Tit. XII, Div. 7, entitled "assessments," are found all of the provisions authorizing assessments for the construction of streets, and of sidewalks, and of sewers, each of the different kinds of improvement being provided for by separate statutes, under specific subdivisions, respectively entitled, "assessments in general," "sidewalks and water courses," and "sewers and assessment therefor."

Section 2283, Rev. Stat., is found under the subdivision, "assessments in general," and apparently would apply to any kind of assessment; but its language restricts its application to cases where assessments are sought to be levied "for making two different streets" within five years.

It is very plain that the making of a street is quite a different matter from constructing a sidewalk, or building a sewer. Whether a sewer is a necessary part of a street improvement, depends upon circumstances. Probably but a small number, comparatively speaking, of streets are constructed with sewers in them, at the first instance. Usually sewers are laid, not as a part of complete street construction, but for the purpose of serving the needs of the people, whose lands abut on the street. Doubtless for this reason, the legislature provided separate systems of procedure and assessment, each applicable to the particular kind of improvement thought necessary at any certain time by the legislative body of a municipal corporation.

The effect of the decision in *Nitzel v. St. Bernard*, *supra*, is that such body might, by taking all of the steps separately provided for the construction of streets, and the laying of sewers, proceed with both improvements concurrently; but must separate the assessments, so that the property owner might have the opportunity of electing to pay either assessment in cash, if he desired to do so, instead of being compelled either to pay in cash as one assessment, or let both run for the prescribed period of years as liens on his property.

The conclusion must be that while "making" a street might include the laying of a sewer in it, if the circumstances made a sewer a necessary part of its construction, yet the laying of a sewer is not *per se* the making of a street by any sort of reasoning, and, therefore, that sec. 2283, Rev. Stat., does not apply to this case.

In *Hunt v. Hunter*, 5 Ohio Circ. Dec., 90, it was held that an assessment for a stone sidewalk levied within five years from the time an assessment was made for grading the street, was proper, although the sum of the two assessments exceeded 25 per cent. of the value of the land assessed, the circuit court in the sixth circuit being of opinion that assessments for sidewalks were made under a different statute from that under which streets are improved.

In *Cole v. Hunter*, 1 L. N., 19, an assessment for a stone sidewalk was levied on a lot within two years of an assessment for paving the street. It was not claimed that the case came within sec. 2283, Rev. Stat. Pugsley, J., held that the two assessments could not be added together for the purpose of applying 25 per cent. limitation to them, but each was valid to the extent of that per centum of the value of the property.

Without doubt, no single assessment for any of these several kinds of improvement is, under sec. 2271, Rev. Stat., valid for a greater sum than such per centum. Assessments for making streets are set aside almost

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daily for exceeding that sum, and it has also been held that the rule applies to sewer assessments, in addition to the \$2 per foot limit of sec. 2384, Rev. Stat., *Conner v. Cincinnati*, 5 Ohio Circ. Dec., 199. It would seem therefore from these authorities, and from the statute, that within five years, three assessments, each for 25 per cent. of the value of the property, might be levied to cover the cost of improving a street by grading and paving, by constructing a sidewalk (if the owner, after notice, failed to construct it,) and by laying a sewer.

The claim of double assessment must, therefore, fail, and with it falls also the contention that the value of the properties of the respective plaintiffs, fixed by the superior court of Cincinnati, in the suit brought to enforce the assessment for the street improvement of 1890, is conclusive in this case; for the subjects of action in the two cases are different.

The values of the lots per front foot, subject to this assessment, the court, under the testimony, fixes as follows, not taking into consideration the value of any improvements thereon: Fugman's, Fuchs', Emig's and Jung's, at \$14; Davis' lot at \$4; Prinz's lot at \$12; the Building Association's lot at \$7; Bode's lot at \$9, and Millers' lot at \$6. It is apparent that the respective lots of Davis, the Building Association and Miller will not stand an assessment of \$2 per front foot. As to them the plaintiffs concede that no interest should be assessed, *Burkhardt v. Cincinnati*, 4 Ohio Circ. Dec., 586, until this court shall have determined the amount due.

The plaintiffs claim interest and penalty under secs. 2285 and 2286, Rev. Stat.

In *Toledo v. Platt*, 3 Ohio Dec., 28, Judge Pugsley holds that the penalty is due at the time fixed in the assessing ordinance, and puts the penalty on the same plane with the interest, and that seems right. In these cases, therefore, where the court reduces the assessment, because it is more than 25 per cent of the value of the property, no penalty should be recovered, for at no time did the defendant in such case owe the amount claimed from him, and he was justified in resisting its collection. In the other cases, however, the defendants should pay interest and penalty.

In the former class of cases, the plaintiffs should pay the costs; in the latter the costs will be equally divided between the plaintiffs and the defendants.

That the sewer is of no actual benefit to the defendants' property, is immaterial. The exercise of the power to construct the sewer and to levy an assessment for the cost pre-supposes the question of benefits to have been determined. *Conner v. Cincinnati supra*; *Holte v. McDermott*, 5 Ohio Dec. Re., 494; *Gates v. Kohn*, 3 Ohio Dec., 679; *Railroad Co. v. Connelly*, 10 O. S., 159.

A decree may be taken in accordance with this decision.

W. H. Whittaker and Jones & James, for plaintiff.

I. J. Miller, Reuben Tyler and B. F. Ehrman, for defendants.

COUNTY RECORDER—EVIDENCE—MORTGAGES.

[Allen Common Pleas, October Term, 1897.]

GUS KALB, ASSIGNEE, ETC., v. ED. WISE ET AL.

1. The duty imposed upon the county recorder by sec. 1144, Rev. Stat., to indorse upon instruments presented for record the precise time of record, is a ministerial duty only, no higher than that imposed upon clerks of court, and upon the probate judge and his deputy clerk in filing papers in their respective courts, and is *prima facie* only and not conclusive evidence of the correctness of the indorsement, so that evidence may be received of the time the deed was actually left with the recorder for record.
2. It is not the fact of handing a mortgage to the recorder and his indorsement thereon of the time of filing, which makes the mortgage notice of the lien created by it; but the fact that it was so presented to the recorder for record, and by him indorsed and filed in his office, where any interested party may inspect it, which makes it notice of the lien created by it.
3. The object of filing a mortgage in the office of the recorder is two-fold: First, to fix the time when the lien attaches; second, as a public notice of the fact of, the lien and the precise time when it attached.
4. To constitute a delivery of a mortgage to the recorder "for record" within the meaning of sec. 4133, Rev. Stat., it must be delivered at the office of the recorder and deposited in such office where it can be inspected.
5. A delivery to the recorder when not in his office, or to another person outside the recorder's office, is not effectual until the same is placed on file in the office of the recorder.

RICHIE, J.

The plaintiff, Gus Kalb, as assignee of Ed. Wise, insolvent, filed his petition in the probate court of Allen county, Ohio, asking for an order to sell the real estate of the insolvent, and made parties defendant all who claimed to hold liens upon such real estate.

Meyer Kuhn filed his cross-petition setting up a mortgage executed to him by the insolvent which was left with the recorder of Allen county for record on February 6, 1896, at seven o'clock and fifteen minutes P. M., purporting to secure notes amounting to more than one thousand dollars.

Abraham and Julius Wise filed their cross-petition setting up a mortgage executed by the insolvent to them, which was left with the recorder of Allen county for record February 6, 1896, at seven o'clock and thirty-five minutes P. M., purporting to secure a claim of some three thousand dollars.

The records of the probate court show that the deed of assignment, executed by said insolvent, was filed in the probate court on February 6, 1896, at seven o'clock and forty-five minutes P. M.

A number of the general creditors of said insolvent filed answers to the cross-petitions of Meyer Kuhn and of Abraham and Julius Wise, in which they deny that said mortgages had been filed for record with the recorder of Allen county at the times averred in said cross-petitions, and aver that said mortgages were not filed for record with the said recorder until after eight o'clock P. M. of said 6th day of February, 1896, and after the filing of said deed of assignment in the probate court of said county.

A hearing was had in the said probate court upon agreement as to facts. The probate court found against said mortgagees, who appealed said cause to the court of common pleas of said county. Said mort-

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gagees refused to submit the cause to this court upon said statement of facts, and it was heard and submitted upon the testimony. The mortgagees offered in evidence the original mortgages, and also certified copies of the record of each of said mortgages, by which it appeared that the recorder had endorsed upon the mortgage to Meyer Kuhn, "Filed for record, February 6, 1896, at seven o'clock and fifteen minutes P. M." And upon the mortgage to Abraham and Julius Wise, "Filed for record February 6, 1896, at seven o'clock and thirty-five minutes P. M."

The general creditors offered testimony tending to show that said mortgages were not filed in the office of the recorder of Allen county, Ohio, before said deed of assignment was filed in said probate court of said county, and that they were not handed to said recorder for record until some time after said deed of assignment was filed; to which testimony the mortgagees objected, for the reason that oral testimony was inadmissible to vary or contradict the indorsements placed upon the mortgages by the recorder. The court overruled the objection, and permitted testimony to be introduced tending to show all the details of the transaction.

The facts as shown by the testimony so admitted are: That on February 6, 1896, the recorder of Allen county had two assistants in his office, his wife and son, neither of whom had been appointed and qualified as a deputy as required by sec. 1141, Rev. Stat. That at seven o'clock P. M., of February 6, 1896, the custodian of the mortgages, who held the same for the purpose of having them filed for record, and who also held the deed of assignment for the purpose of filing the same, went to the office of the recorder and found it closed. He then went to the residence of the recorder, and finding him absent, handed the mortgages to the wife of the recorder, who wrote the indorsements thereon as to time of filing. Said mortgages remained in the custody of the recorder's wife until her husband returned home some time after nine o'clock P. M. of same day, when she delivered the mortgages to him. After the recorder received the mortgages from his wife, he went to his office and left the mortgages there, but did not change the file marking placed thereon by his wife. The deed of assignment was filed in the probate court, as shown by the testimony, at the time it bears file mark, February 6, 1896, at seven o'clock and forty-five minutes P. M.

A motion was made by the defendants to rule out all the testimony so admitted over their objection tending to impeach, vary, explain or contradict the endorsements which appear upon each of said mortgages.

If such testimony should be excluded, there remains no question for the court to determine, for the deed of assignment having been filed at seven forty-five P. M. on February 6, 1896, and if the endorsement on the mortgages impart absolute verity, and are conclusive as to the time of filing, and the date of filing stated thereon being prior to the actual filing of the deed of assignment—the statute fixing the time when a mortgage shall take effect, sec. 4133, Rev. Stat.—determines the fact of the priority of the liens of the mortgages.

But is the indorsement placed on the mortgages conclusive proof of the time when they were legally filed for record? Section 1144, Rev. Stat., provides, that "upon the presentation of a deed or other instrument of writing for record, the recorder shall indorse thereon the date and the precise time of day of its presentation—." So that the act of entering upon the mortgages the time they were presented for record, was not a matter of convenience merely, but was the performance of a statutory

duty; and the presence of the indorsements upon the mortgages is presumptive evidence that the time thereon stated is the precise date at which they were presented for record.

In *Tracy v. Jenks*, 15 Pick., 465, the court says: "The original certificate of the register of deeds as to the time when a mortgage deed was received for record, is conclusive as between the mortgagee and a creditor who has attached the mortgaged land subsequently to the time stated in such certificate." The same verity was held as to the certificate of a town clerk as to the time of filing a mortgage of personal property, in *Ames v. Phelps*, 18 Pick., 314. In *Fuller v. Cunningham*, 105 Mass., 442, the court held that the certificate of the clerk as to time of service was conclusive. And in *Adams v. Pratt*, 109 Mass., 59, it was held that the certificate of the recording officer could not be contradicted by the record of the instrument.

The same rule appears to obtain in Maine. *Hatch v. Hoskins*, 17 Me., 391. Also in Alabama as held in *Bubose v. Young*, 10 Ala., 365, and *Parsons v. Boyd*, 20 Ala., 112.

In Virginia it was held in the case of *Horsev v. Grath*, 2 Gratt., 471, that the true date of filing of a deed might be shown by parol as against the date entered upon the instrument by the recording officer.

In *Wing v. Hall*, 47 Vt., 182, the court held that in the absence of proof to show a different date, the presumption is that the true date was entered upon the instrument; but the true date could be shown by testimony dehors the record. The same rule seems to obtain in New York, Illinois and a number of other states.

I have not access to the statutes of Massachusetts, and am unable to determine what verity is given by statute to the certificate of a recording officer; and as all the Massachusetts decisions refer to the "certificate" of such officer, it may be doubted whether the decisions of that state are applicable to the case at bar.

In view of the apparent conflict of authorities of other states, this question must be determined from the statutes of our own state, aided by such analogies as may be drawn from the decisions of our own courts where similar duties are imposed upon other officers by statute.

The duty imposed upon the recorder by sec. 1144, Rev. Stat., is a ministerial duty only; and if such ministerial act of a recorder is more conclusive than the ministerial acts of other officers charged with the performance of ministerial duties, such verity must be conferred by legislative enactment. Section 4143, Rev. Stat., provides when and where a certified copy of a deed or other instrument recorded in the recorder's office shall be received in evidence, and declares the degree of weight to be given to such certified copy. The language of sec. 4143, Rev. Stat., is as follows: "A copy of the record of a deed or other instrument of writing, duly certified by the county recorder with his official seal affixed thereto, shall be received in all courts and places within this state as *prima facie* evidence of the existence of such instrument, and as conclusive evidence of the existence of such record." It is only conclusive as to the fact of such record, and not the correctness of that which is recorded. The legislature could not have intended that the record should have such binding force that a mistake of the recorder should supplant the instrument recorded, or in any way change its terms or destroy its potency. It will be observed that the language used in sec. 4143, Rev. Stat., is so guarded as not to give opportunity to extend its meaning. The certified copy shall be "conclusive evidence of the existence of

such record"—not of the truth of the matter recorded—but only of the fact that such record exists. By sec. 1145, Rev. Stat., it is made the duty of the recorder to "record the date and precise time of day when same was presented for record." So that the certificate is conclusive evidence of that fact, but is not conclusive as to the correctness of the date so recorded. It is only *prima facie* evidence of that fact as it is *prima facie* evidence of the correctness of any other fact shown by the record.

The statute does not make the certificate conclusive as to the time it was presented for record; and having designated the particular in which it shall be conclusive, furnishes a declaration of the legislative intent that it shall not be conclusive in any other respect. "*Expressio unius est exclusio alterius.*"

The duty enjoined by statute upon a recorder to indorse upon written indorsements presented to him for record, is not a higher duty than that imposed upon the clerks of courts, and upon the probate judge and his deputy clerk in filing papers in their respective courts. The court, in *Haines v. Lindsey*, 4 O., 90, held, that the clerk performs a ministerial duty in the filing of papers in his office. The court in *Nimmons v. Westfall*, 33 O. S., 213, held that the indorsement on a paper filed in the district court, of the time it was left with the clerk, was not essential to its filing, and was but evidence of the fact. In *King v. Penn.*, 43 O. S., 57, the court held in fourth syllabi: "Where a paper is in good faith delivered to a proper officer to be filed, and by him received to be kept in its proper place in his office, it is filed. The indorsement upon it by such officer of the fact, and date of filing, is but evidence of such filing."

In *Claffin v. Evans*, 55 O. S., 183, the court held that a delivery of a deed of assignment to the probate judge was a filing at the time of such delivery, although the indorsement on the deed stated a different time—some two hours later. This decision was based upon sec. 6335, Rev. Stat., which requires the assignee "to appear before the probate judge of the county in which the assignor resided at the time of executing the said assignment," and "cause the same to be filed in the probate court," and "the exact time of such delivery shall be indorsed thereon by the probate judge, who shall immediately note the filing on the journal of the court." The third syllabus in that case is: "While the presumption is that the officer performed his duty, and the endorsement speaks the truth, that presumption is not conclusive, but the true time of delivery of the assignment may be shown by the parties whose interests are affected."

While the language used in sec. 6335, Rev. Stat., is not identical with that used in secs. 1144 and 1145, Rev. Stat., defining the duties of a recorder when a deed or mortgage is presented for record, yet the duty imposed upon a recorder by the latter section is substantially the same as required of a probate judge by the former section. If the indorsement of the probate judge is not conclusive, no reason is apparent why the indorsement of a recorder upon an instrument filed with him for record should be conclusive.

It appears, therefore, that it was not error to receive testimony as to the time the mortgages in question were actually left with the recorder for record.

The inquiry then arises, were the mortgages to Kuhn and to Wise left with the recorder of Allen county "for record" prior to the time the deed of assignment was filed in the probate court of said county? Sec-

tion 4133, Rev. Stat., provides that "all mortgages executed shall be recorded in the office of the recorder of the county in which the mortgaged premises are situated, and shall take effect from the time the same are delivered to the recorder of the proper county for record; and if two or more mortgages are presented for record on the same day, they shall take effect from the order of presentation for record; the first presented shall be the first recorded, and the first recorded shall have preference."

Section 1139, Rev. Stat., requires the office of the recorder to be kept in such room or rooms at the county seat as the commissioners provide. Mortgages must be recorded in the recorder's office under sec. 4133, Rev. Stat., and their lien is fixed at the time they are delivered for record. Section 4134, Rev. Stat., provides that all conveyances shall be fraudulent as to subsequent purchasers without notice, "until so recorded or filed for record."

No duty is imposed upon the recorder by statute relating to the receiving of deeds and other instruments required to be recorded by him which may not properly be performed in his office; and in no instance does the statute require him to perform such duty at any place outside of his office. His records must be kept in his office, and he must record instruments in his office; may make copies of the records in his office, and must affix his seal of office to each certificate to such copy.

Since the year 1839, the statute gave effect to mortgages from the time of filing for record. But "all other deeds and instruments in writing for the conveyance or incumbrance of any lands—" were required to be filed for record within six months from the date of execution, and were fraudulent only as to subsequent conveyances when not so recorded under the statute of 1832. On May 4, 1885, the legislature recognized the necessity for shutting off the opportunity which this provision afforded for the practicing of fraud under this provision, and amended sec. 4134, Rev. Stat., so as to give effect to all such instruments only from the date of filing for record.

It would be inconsistent with the objects for which records are kept in the office of the recorder, to assume that the legislature intended that only a part of the official acts required of the recorder should be performed in his office, and that he might perform a portion of his duties upon the streets, or at any place outside of his office, and make records outside of his office, which should be notice to the public or those making inquiry at the recorder's office, when no such record existed in that office. The indorsement upon a mortgage made at the time it is presented for record, of the time of filing, is the official statement of the fact of filing, and of the time of filing, and is notice to all who may have an interest in, or may desire to acquire an interest in the real estate described in the mortgage, of the existence and contents of such mortgage and of the lien created thereby, and of the precise time when such lien attached. It is not the act that the mortgage was handed to the recorder, and that he indorsed there on the time of filing, which makes such mortgage notice of the lien created by it; but the fact that it was so presented to the recorder for record and by him indorsed and filed in his office, where any interested party may inspect it, which makes it notice. The object of keeping such records is to enable parties to ascertain the exact condition of the title to any real estate, in or to which they have or wish to acquire an interest. If the lien of a mortgage attaches at the time it is handed to the recorder, when not in his

office, and when he has noted the day and exact time he received it on the mortgage, and before the same is placed in his office, where it may be inspected, such lien would continue for a day, or a week, or a month, without the same being placed in the recorder's office.

The object of filing a mortgage in the office of the recorder is two-fold: First, to fix the time when the lien attaches; and, second, as a public notice of the fact of the lien and the precise time when it attached. Such filing in the office of the recorder is notice by which all persons are bound, for it is then placed in such position that an examination of the records and files in the recorder's office will apprise them of the existence of the lien which the statute declares shall attach when so filed, and which the law declares shall be notice of that fact, although no actual notice exists by reason of a failure to make inquiry at the office of the recorder. To hold otherwise would be to place it without the power of an interested party to know the state of a title by an examination of the records and files in the recorder's office; for if the handing of a mortgage to the recorder when not in his office was a legal filing, if he indorsed the time of filing upon the mortgage, such act of any deputy recorder would be equally binding. If the recorder or such deputy was absent from the office for an entire day, he could legally receive and file any number of mortgages, of which no person examining the records in the recorder's office during that day would or could have any notice; and if such filing created a lien from the time so indorsed upon each mortgage, an avenue of fraud would be opened up which could not have been contemplated by the legislature.

The act of filing being ministerial, no reason is apparent why the same rule should not apply to the ministerial acts of a recorder as applies to the ministerial acts of a clerk of the courts or probate judge or his deputy clerk. In *Haines v. Lindsey*, *supra*, the court, on page 90, in speaking of the filing of a paper in the clerk's office say: "Had the paper been placed in the office, either strung upon a thread, laid in a drawer or pigeon hole, we conceive it would be filed within the terms of a law." The cases of *Nimmins v. Westfall*, and *King v. Penn*, *supra*, sustain this holding.

In *Claffin v. Evans*, 55 O. S., 183, in the second syllabi, the court uses the term "delivered to the probate judge," as the equivalent of the language, "appear before the probate judge," with the deed of assignment and "cause the same to be filed in the probate court;" as used in the section of the statute then under consideration. *Williams, C. J.*, in delivering the opinion of the court, recognizes the universal rule adopted in the construction of similar statutes, that to file a paper with an officer, is to file it in the office of such officer.

The conclusion seems irresistible that to constitute a delivery of a mortgage to the recorder "for record" within the meaning of sec. 4133, Rev. Stat., it must be delivered at the office of the recorder and deposited in such office where it can be inspected; and that a delivery to the recorder, when not in his office, is not effectual until the same is placed on file in the office of the recorder. A delivery to the recorder outside of his office not being a valid filing, until actually placed on file in his office, the delivery to another person outside the recorder's office could be of no benefit to the mortgagees.

The mortgages in question not having been filed in the office of the recorder of Allen county, Ohio, before the deed of assignment was filed in the probate court of said county, did not become liens upon the prem-

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ises therein described, prior to the filing of the deed of assignment. It follows that the mortgagees obtained no preference over the general creditors of the insolvent by reason of the execution of said mortgages and the filing of the same for record.

Ridenour & Halfhill, for assignee.

Cable & Parmenter, Cunningham & Adgate, for mortgagees.

Prophet & Eastman, W. B. & W. J. Richie, Meade & Mowen, for general creditors.

SALE OF REAL ESTATE.

[Stark Common Pleas, 1896.]

EMERY CHANDLER V. MARY LOMADY.

1. When tracks of land are sold, if a small strip remains, as where the purchaser of a building obtained title to a lot three feet shorter than the building itself, it becomes the property of the last buyer, unless specification is made to the contrary.
2. In the case above fore-shadowed it was held that the building should remain, the owner to have title to the three feet. but that title to land beyond the projection of the eaves did not pass.

MCCARTY, J.

This is a case involving ownership of land in the city of Massillon. It appears that one Emery Chandler bought of Mary Lomady a certain brick building, but obtained title to a lot three feet shorter than the building itself. Suit was instituted to determine the ownership of that short strip.

The court holds that when tracts of land are sold, if a small strip remains, that strip becomes the property of the last buyer, unless specification is made to the contrary. In this case the decree is that the brick building should remain, its owner to have title to the three feet, but the land below the projection of the eaves does not become the property of this particular plaintiff.

ALLEYS—AMBIGUOUS PLAT.

[Superior Court of Cincinnati, General Term, May, 1895.]

†CRANE ET AL. V. BUCKLES ET AL.

Where a plat of a subdivision is ambiguous as to what lengths of lot lines therein worked refer to, the deeds of the original owner may be resorted to, especially if plaintiff claims under them, to show the depth of the lots and proper location of a rear alley.

HUNT, J.

This controversy grew out of the location of a certain alley or alleys in a plat of ground designated as the subdivision of Carrsville, in what is known as the East End.

† For another decision of this court in same case, see 1 S. and C. P. Dec., 672.

It appears that on May 1, 1890, Clinton Crane and I. O. Cole, partners as C. Crane & Co., filed a petition in the superior court in special term, in which, after alleging certain facts as to the plat and ownership, they invoked the equitable interference of the court to enjoin the defendants from obstructing the alley or alleys in question. It is charged that the defendants placed obstructions or fences in and across the same, and it is sought to enjoin the defendants from obstructing in any way the egress or ingress of the plaintiffs to their property.

A temporary restraining order was issued by the court below on giving bond.

The defendants, Frank Buckles and others, on May 15, 1890, filed their answer and cross-petition, in which they deny each and all the allegations of the petition. They further aver that in the rear of the premises is an alley, sixteen feet in width, running from Hazen street three hundred and seventy-five feet, the same width in a westerly direction, and that, at its western extremity, is another alley, fifteen feet in width, connecting said first named alley with Front street in the city of Cincinnati.

The equitable interference of the court is likewise sought to require the plaintiffs to open up the alleys in question, and to enjoin them from keeping enclosures in the same.

On June 7, 1890, an answer and cross-petition was filed by Clara L. Shockley, one of the defendants, and on September 4, 1890, an amended petition was filed as to Charles Lowe, and on October 21, 1890, a reply and answer to the answer and cross-petition of the defendants was filed.

The general term of the superior court, on December 7, 1891, entered a decree in which the equities of the case were found against the plaintiff, and that the defendants were entitled to the relief prayed for in their second answer and cross-petition.

There was a further finding that the alley in question is sixteen feet wide and that the north line is on and along the southern boundary line of lots 2 and 16, both inclusive, being one hundred and twenty-one feet south of the south line of Eastern avenue and extending from Hazen street westwardly to the west line of lot 2, where it intersects another alley sixteen feet wide and extending northwardly; that its (said Glenn alley) south line is along a line parallel to and sixteen feet south of the north line thereof, extending from Hazen street to and connecting with the other alley, extending thence northwardly, and that the latter alley extends with its east line from Glenn alley northwardly along the west boundary line of said lot 2 to Eastern avenue and with its west boundary line sixteen feet west of and parallel to the west boundary line of said lot 2.

The court affirms and fixes the boundaries of the alleys thus designated.

The cause is now before the court upon an application for an order against Crane and others to show cause why they should not be proceeded against for contempt in not obeying the order of the court. Unless counsel can agree as to the fact whether there was an obstruction in the alley thus fixed, the court would hear evidence to the end that the obstruction might be removed and the order of the court enforced.

Joseph W. O'Hara and John W. Warrington, for the order.

C. W. Baker, *contra*.

SMITH and MOORE, JJ., concur.

John Larney, ex Parte, Habeas Corpus.

EXTRADITION—HABEAS CORPUS.

[Superior Court of Cincinnati, Special Term, 1881.]

JOHN LARNEY, EX PARTE, HABEAS CORPUS.

1. In extradition to a fugitive from justice, the guilt or innocence of the prisoner is not the question; under the constitution the question simply is, that the prisoner be duly charged with crime in the demanding state.
2. On *habeas corpus*, therefore, proof of an alibi is not admissible, but proof that the prisoner, while he committed the crime, was not actually but only constructively in the demanding state is admissible.

Motion for leave to file petition in error overruled by Supreme Court.

HARMON, J.

The question in this case arises upon the motion of the sheriff's counsel to exclude certain testimony introduced by the prisoner in support of the allegation in his reply to the sheriff's answer that he is not a fugitive from justice, and did not flee from the state of Illinois, but was not present in that state at the time when he is charged in the requisition of the governor of that state, and the indictment and affidavit accompanying it, with having committed therein the crime of grand larceny, and that therefore the governor of Ohio had no authority to issue the warrant upon which he is in custody.

The question is a double one. What is it competent for the prisoner to prove in such a case, and does the evidence tend to prove it? It is broadly contended for the prisoner, that the fact of his being a fugitive from justice, in the sense of having fled from the demanding state on purpose to avoid the consequences of his conduct there, is jurisdictional, and that, therefore, if it appear that there was no evidence of that fact before the governor when he issued the warrant, it is void, while if there was such evidence, it is open to be rebutted by the prisoner in this proceeding. The propositions followed to their logical results would abolish all limitation to the inquiry to be made by the court upon *habeas corpus* in such cases. While it is settled that the question of the prisoner's guilt or innocence can not as such be raised, because all the constitution requires for his extradition is, that he be duly charged with crime in the demanding state; yet, if the actual fact that he fled from justice, in the sense contended for, be the basis of the governor's jurisdiction to surrender him, and not the fact that he is charged with actual criminal presence in the demanding state, and demanded as having left it before he could be arrested, why may he not prove his innocence as bearing upon the question of his having fled and being a fugitive from justice? If he committed no crime, how can he be a fugitive from justice? If he merely left the state, not having offended its laws, and not even aware that he was charged with so doing, how can it be said that he fled from it? The constitution refers to "a person charged * * * with crime who shall flee from justice," while the act of 1793, Rev. Stat. U. S., 5278, provides for the surrender of any person "demanded as a fugitive from justice," as does our act of March 3, 1875. The argument of prisoner's counsel would require the very strict construction of the constitution, that it refers only to those who flee with hot foot because already charged or about to be charged with crime. But such has not been the ruling of courts nor the opinion of jurists. It is sufficient if

the person "withdraws himself without waiting to abide the consequences of his conduct." *Matter of Voorheis*, 3 *Vroom*, 147. Judge Cooley, in *Princeton Review*, 7 A. L. Rec., 722.

The framers of the constitution naturally used language which described the ordinary conduct of guilty persons in such cases, yet it can not be doubted that they intended it to cover any case of voluntary withdrawal of physical presence, however deliberate, and although in fact occasioned by other motive than fear of prosecution, where its effect is to escape prosecution. They certainly did not refer to a person not actually but only constructively present in the demanding state. The language is not "a person charged, etc., in one state and found in another," but, "who shall flee and be found." *Wilcox v. Nolze*, 34 O. St., 520.

Upon the case just named, the prisoner's counsel mainly relied, and some of the language of the opinion, considered without reference to the question under discussion, would perhaps bear the construction that the absolute fact of actual presence of the prisoner in the demanding state, at the time of the alleged offense and flight therefrom, is jurisdiction and always open to disproof. But when it is considered that in the same opinion it is said as to the questions open to inquiry, "nor have the courts larger powers in these respects than the governor;" that in *Work v. Corrington*, 34 O. S., 64, it is held, that when requisition is made, "and the case shown to be within the provisions of the constitution and act of congress, no discretion is vested in the governor, but it is his imperative duty to issue the warrant;" and that in *ex parte Sheldon*, 34 O. S., 319, it was held that "an alleged fugitive, etc., will not be discharged on the ground that there was no evidence before the executive issuing the warrant showing that the fugitive had fled from the demanding state to avoid prosecution;" "that it was for the executive to put a construction upon the language" of the affidavit before him upon this subject; we are bound to understand the court as meaning that where it is made clearly to appear, not that there is greater testimony for the prisoner than for the demanding state, upon the issue of his having been present in that state when charged with so being, but that the prisoner is not really charged with having been actually present there at all, or really demanded as a fugitive in the sense of the constitution, but only as constructively present and a fugitive, the governor has no jurisdiction. The court found that there was "no conflict in the testimony that Nolze's statements were all made in this state," referring to the statements alleged to have been false pretenses, upon which he was charged with obtaining goods from a firm in New York. It appears that the court had before it all the papers and proofs upon which the governor had acted, yet there was no conflict upon this question. The prisoner was probably merely charged in those papers as in *ex parte Sheldon*, with being a fugitive—a mere legal conclusion.

But suppose there had been a conflict in the testimony. Suppose the papers and proofs upon which the governor acted had specifically charged that Nolze had made, in the state of New York, the false statement with which he was charged, that he had been there and afterward came to Ohio. Did the court mean to say that upon the production by the prisoner of a preponderance of evidence to the contrary, the jurisdiction of the governor would cease and the prisoner become entitled to his discharge? I do not think so. The prisoner was permitted, not to disprove what was proven on behalf of the demanding state, but to prove

something which did not appear before the governor, which took away his power to act. I do not understand the court as dissenting from the well settled law, Wharton on Criminal Pleadings and Proceedings, sec. 85, No. 6; Spear on Extradition, 303, that the averments of the indictment and affidavit can not be contradicted by parol. I do not think the governor's jurisdiction depends upon the uncertain and varying judgment of the many courts to which the prisoner may appeal by *habeas corpus* upon a question of weight of evidence. Even if the same evidence were presented, courts might differ as to the side having the preponderance. The ultimate power of determination must rest somewhere, and the policy of the law requires that it be with the governor.

When the prisoner is demanded as having committed a crime, while actually in another state, as having placed himself beyond the reach of prosecution therefor, by withdrawing his presence, and the evidence duly presented by the governor of such state sustains those facts, our governor's jurisdiction attaches, and certainly does not shift and reshift by any subsequent conflict of evidence; though the prisoner's rights are fully protected by the governor's right to revoke his warrant. *Work v. Corrington*, 34 O. S., 64.

But if I am mistaken, and the Supreme Court mean to announce the broad rule that it is always open to the prisoner, not merely to show upon *habeas corpus* what I have just indicated, but to overcome, by evidence, the proof made against him, the evidence sought to be excluded here does not go far enough to entitle him to invoke the principle of that case.

The indictment charges that the prisoner committed the crime of grand larceny at Galesburg, Ill., on July 3, 1879. The accompanying affidavit avers, that on or about July 4, 1879, he fled from that state to this. The crime charged is one requiring his actual presence at the place of commission. He is not sworn in general terms to be a fugitive which might include construction by the witness, but to have fled from that state to this at or about a certain time. The depositions and the prisoner's own testimony are to the effect that during the whole of July 3 and 4, 1879, he was in Cleveland, O., his home. He says he arrived there at 6 a. m. on the former day, whence he does not state. There is no evidence that he never was in Illinois, not even that he was not there about the time laid in that indictment and mentioned in the affidavit. For aught that appears he may have been there on the 1st of July, or the 6th. He does not apply his evidence to the material portions of the charge against him, as Nolze did. He does not show that he was not in Illinois when the money was stolen which he is charged with stealing. He does not contradict the affidavit that he fled from that state on or about July 4, 1879. He assails only the immaterial part of the charge in the indictment, the time laid, variance as to which even upon trial would be immaterial. *Roscoe's Crim. Ex.*, 100; *Wharton's Crim. Ex.*, sec. 103. Nor does he make it appear, the evidence does not even suggest the possibility, that an effort is being made to extradite him upon the theory of his constructive presence at the commission of the crime.

While the fact that the evidence offered might be competent upon his trial to prove an alibi is no objection to its use for another legitimate purpose here, yet the fact that it tends to prove nothing but a mere alibi is fatal to it.

The suggestion that a guilty person may escape extradition by showing that he did the guilty acts in another than the demanding state, while a person fully prepared to show his innocence may be taken if the

Superior Court of Cincinnati.

evidence be excluded, has weight now. Extradition does not depend upon actual guilt, but upon flight from a charge of guilt, and if in showing he never was present in the demanding state and never fled therefrom, he shows he was guilty somewhere, as in case of Nolze, it is a mere incident.

The motion will be granted, and the prisoner remanded to the sheriff's custody to be dealt with according to law.

DIVORCE.

[Cuyahoga District Court, September Term, 1881.]

Lemmon and Rouse, JJ.

MORSE V. MORSE.

Where a decree is sought under sub-division 7 of sec. 5689, Rev. Stat., for "any gross neglect of duty," it is not necessary that the cause of divorce should have continued for three years.

LEMMON, J.

Where a decree is sought under sub-division 7 of sec. 5689, Rev. Stat., for "any gross neglect of duty," it is not necessary that the cause of divorce should have continued for three years.

In this case it appears by the findings of the court set forth in the journal entry that for a period of about six months the defendant has been guilty of gross and wilful neglect of her marital duties, and that the plaintiff was entitled to a decree of divorce on that ground, unless it is necessary under the statute that the gross neglect of duty should continue for three years, and as the court was of the opinion that the cause must exist three years, the petition was dismissed, with costs.

Held, that by the insertion of the word "any" in the statute, it is evident that the intention of the legislature was to leave the granting of the decree to the sound discretion of the court trying the case, and that it is not necessary that the cause of divorce should have continued for three years. Any other construction would render the statute nugatory and superfluous. It is not necessary that a woman should starve for three years to entitle her to the benefits of the statute. Where the neglect is such that it is merely tantamount and equivalent to wilful absence, a sound discretion might require the cause to have existed for three years in analogy to the provision of the statute requiring wilful absence to have continued three years; but where the neglect is otherwise, is gross, and is passively cruel, as in a case of starvation or failure to provide clothing, fuel, or the like, it is not necessary that the cause should have existed for three years. This holding is sustained by a majority of the judges in the western district of the state. The judgment of the court below is reversed, and the cause is remanded for further proceedings.

Pennewell & Lamson, for petitioner.

Foster & Lawrence, for defendant.

Estate of Elizabeth Bates.

PARDON—HABITUAL CRIMINAL LAW.

[Belmont Common Pleas, 1897.]

STATE OF OHIO V. JAMES WILLIAMS.

A pardon obliterates the record of the conviction, so far as the operation of the habitual criminal law is concerned.

HOLLINGSWORTH, J.

In the case of the State of Ohio v. James Williams, indicted for murder in the second degree, and also a finding under the habitual criminal act, the defendant was found guilty as charged. The defendant pleaded in bar a pardon to one of the former convictions, to which the state interposed a demurrer, which was sustained by Judge Dreggs, the former judge. On a motion to set aside the verdict of the jury for a new trial, the court now sustains the motion as to the latter conviction, holding the sustaining of the demurrer to the plea in bar, error.

COUNTY WARRANTS, DELIVERY AND PAYMENTS—REMEDY.

[Hamilton Common Pleas, 1896.]

STATE EX REL. V. AUDITOR OF HAMILTON COUNTY.

1. It is not an unwarranted stretch of authority for the county auditor to deliver a warrant, drawn in payment for goods purchased, to the selling agent of the company, but payment of such warrant by the county treasurer to such agent is wholly without authority.
2. Mandamus will not lie to compel the county auditor to issue a second warrant, where the first has been illegally paid by the treasurer to an agent, who committed suicide before accounting to the company. The company's remedy is by an action at law.

JELKE, J.

Mandamus will not lie against the county auditor to compel him to issue a second voucher in favor of the Boston Woven Hose Co., for the sum of \$319.50 for goods sold by its agent, A. S. Browne, to Longview Asylum. The bill had been approved by the county commissioners, and a warrant was issued by the county auditor in favor of the Boston Woven Hose Co. The warrant was delivered to their agent, who collected the money from the county treasurer and thereafter suicided without accounting for it to his company. The court held that it was not an unwarranted stretch of authority for the auditor to deliver the warrant to Browne, but that Browne, being a mere selling agent, the payment of the warrant by the county treasurer to him was wholly without authority, and that the company's remedy is by an action at law.

DISTRIBUTION OF ESTATES.

[Hamilton Probate Court, 1896.]

ESTATE OF ELIZABETH BATES.

The probate court will not enjoin the distribution of an estate at the suit of the successor in title to the property, on the ground that the latter, holding a bond by which title is guaranteed, has a claim against the estate not yet due, but which will arise if title proves defective. Such successors in title have an adequate remedy at law.

Hamilton Probate Court.

FERRIS, J.

The court refuses to enjoin the distribution of \$146,000, which has come into the hands of the executor of Elizabeth Bates. The application for injunction was made by the Union Stock Yards Co., successor in title to the property, the title to which was guaranteed by a bond in the sum of \$150,000, executed by E. S. Bates, deceased, husband of Elizabeth Bates, and others. The contention of the company was that there is an outstanding interest in the title, and the company therefore has a claim against the estate not yet due, but which will arise if the title proves defective. The court held that the law favors the distribution of estates, that it is for the purpose of distribution that estates are administered, and that no reason was shown why a different rule should apply to the estate at bar, the petitioners having an adequate remedy at law.

PURE FOOD LAW.

[Hamilton Common Pleas, 1897.]

STATE OF OHIO V. BRECKENRIDGE.

1. In order to entitle defense to a sample of the article in possession of the state on which the prosecution is based, it must be shown that they have no other way of making a defense as to the ingredients of the article in question.
2. The court must also appoint the expert who is to make the analysis for the defense, and the analysis must be conducted in the presence of the expert who made the analysis for the state.
3. When the application is made the court may appoint whoever it pleases to make the analysis for the defense, and is not bound to follow the suggestion of the defendant.
4. The motion for the analysis in behalf of the defense must not be made for the purpose of annoying the state; it must not be made out of mere curiosity, and it must not be made for the purpose of disclosing what evidence the state has.
5. It is not obligatory on the court to appoint an expert or cause an analysis, but is a matter of discretion, the court, in its decision, to be governed by the foregoing conditions.

PUGH, J.

A test case brought under the Pure Food laws. One Breckenridge, who was convicted of selling adulterated mustard, carried the case up, and the point at issue being whether the defense in cases of this kind were entitled, for the purpose of analysis, to a sample of the article in possession of the state on which the prosecution was based: Held, that the defense had a right to have a sample on certain conditions; these conditions are that the court must appoint the expert who is to make the analysis for the defense, and the analysis must be conducted in the presence of the expert who made the analysis for the state. The motion for an analysis in behalf of the defense must not be made for the purpose of annoying the state; it must not be made out of mere curiosity; it must not be made for the purpose of disclosing what evidence the state has, but it must be shown by the defense that they have no other way of making a defense as to the ingredients of the article in question except by securing part of the article which the state is in possession of: Held, also, that it was not obligatory on the court to appoint an expert and cause an analysis for the defense, but it was a matter of discretion with

State of Ohio v. Breckenridge.

the court, and the above conditions should govern the court in its decision. When such an application is made, the court can appoint whoever he pleases to make the analysis for the defense, and is not bound to follow the suggestion of the defendant, and upon this point the justice was sustained.

COLLATERAL INHERITANCE TAX.

[Hamilton Probate Court, 1896.]

ESTATE OF ELIZA BATES.

1. The statute exempts nieces and nephews of decedent from payment of the collateral inheritance tax.
2. Such exemption does not extend beyond the children of decedent's brothers and sisters. It does not, therefore, include nieces of husband or wife.
3. Grand-nieces and charitable institutions are liable to the tax.
4. Where there was no effort made to enforce the law, pending litigation to test its constitutionality, executors were not negligent in failing to pay it within the year, and there is no basis for the penalty.

FERRIS, J.

By the will of Eliza Bates legacies are granted, among others, to nieces and nephews of the testatrix's husband, grand-nieces of testatrix and charitable institutions; also, devises of real estate to grand-nephews. By the inheritance tax law, a penalty of eight per cent. is collectible in case of non-payment within a year of the death of testatrix, which, in this case, occurred more than a year ago.

The court held that the statute exempts nieces and nephews of the decedent; that exemptions are not favored; that such exemption does not extend beyond the children of the testatrix's brothers and sisters, and therefore does not cover the case of the nieces of her consort; that grand-nieces and charitable institutions are liable to the tax. Appraisers will be appointed to determine the value of the real estate. The penalty of eight per cent. should not be, in justice, collected. The direct inheritance tax was declared unconstitutional; it was supposed the collateral inheritance tax would meet the same fate. There was no effort made to enforce the law which has been now held to be constitutional. The amount of the tax is to be certified by the court to the auditor for listing, and then is payable. Because of what has been stated, this has not been done. The executors have not been negligent, and there is no basis for the imposition of a penalty.

Peck & Shafer, for executors.

Healy & Brannan, P. J. Cadwallader, Judge Connor, A. C. Cassatt, for legatees.

Thomas H. Darby, for state.

COLLATERAL INHERITANCE TAX.

[Hamilton Probate Court, 1896.]

ESTATE OF EZEKIEL SIMON.

1. Bequests to charitable institutions are not exempt from the collateral inheritance tax.
2. Nor are bequests to great-nieces exempt from said tax.
3. But where the widow has a right to use part of the principal of the remainder, the value of her estate in the same is not ascertainable, and therefore legacies over to the non-exempt persons are not taxable.

FERRIS, J.

Under the will of Ezekiel Simon, after a number of legacies to charities aggregating \$16,000, and two bequests to great-nieces, the remainder is granted to trustees for the purpose of investment, reinvestment, etc., and to pay the net income to decedent's wife for her life, and also to pay her so much of the principal as she may from time to time require or demand; after her death certain other legacies are to be paid to persons not exempt from the collateral inheritance tax.

Upon an application for instructions by the executor, Judge Ferris yesterday (March 8) decided that the bequests to charitable institutions and to the great-nieces are not exempt from the tax; and also that as the widow has a right to use a part of the principal of the remainder, the value of her estate in the same is not ascertainable, and therefore the legacies over to the non-exempt persons are not taxable. Had the devise to the wife been simply a life estate, the legacies over would be now taxable.

Max B. May, for executor.

Thomas H. Darby, for the state.

PARDON—HABITUAL CRIMINAL LAW.

[Franklin Common Pleas, 1896.]

STATE OF OHIO V. ANDERSON.

A pardon wipes out a conviction from within the scope of the habitual criminal law.

PUGH, J.

In the case of Jim Anderson, the notorious burglar, who has served two terms in prison and was recently tried for a third offense, the court held that the pardon of Anderson by Governor Bushnell wiped out one of the convictions upon which the habitual criminal prosecution was based.

NUISANCE—GARBAGE PLANT.

[Franklin Common Pleas, 1897.]

DANIEL MUNK V. COLUMBUS SANITARY WORKS CO.

1. A garbage plant which casts upon the premises and into and about the dwelling of a property owner in the vicinity, noxious odors, vapor and gases, causing material inconvenience and discomfort, is a nuisance and may be abated by injunction.

Munk v. Columbus Sanitary Works Co.

2. Order in case at bar gives defendant a reasonable length of time, if desired, in which to avail itself of means and agencies within its power to prevent the nuisance, upon condition, however, that if defendant does not, in good faith, make use of such means to abate the nuisance, the injunction shall be operative at once.

EVANS, J.

The entry in the case, which is styled Daniel Munk v. Columbus Sanitary Works Co., is as follows:

"This day this cause came on to be heard upon the pleadings, the evidence and the arguments of counsel and was submitted to the court. On consideration whereof the court finds that the defendant in the operation of its garbage plant is creating a nuisance and in the creation of such nuisance casts upon plaintiff's land and into and about his dwelling, noxious odors, vapors and gases, causing material inconvenience and discomfort to him and his family.

"The court further finds that the plaintiff is entitled to an injunction restraining the defendant from operating its said garbage plant so as to cause offensive and noxious odors, vapors and gases to be cast upon plaintiff's premises in the petition described and into and about his dwelling.

"It is therefore ordered, adjudged and decreed by the court that an injunction be and the same is hereby granted restraining the defendant from operating its garbage plant so as to create or cause to be cast upon the land of the plaintiff in the petition described any offensive, noisome or noxious odors, vapors or gases, or into or about the dwelling of plaintiff from and after the first day of May, 1897.

"This day, to-wit: May 1, 1897, is named and fixed by the court in order that the defendant may, between the date of this entry and the said first day of May, 1897, if it desires so to do, avail itself of the means and agencies within its power to prevent said nuisance. If, however, it shall be made to appear to this court that the defendant does not propose or intend in good faith to make use of the proper means and agencies within its power to prevent said nuisance, said injunction shall be and become operative from and after the date of this entry."

SEWER ASSESSMENTS.

[Hamilton Common Pleas, 1896.]

CINCINNATI, FOR USE, ETC., v. JUNG ET AL.

1. A sewer improvement is not a street improvement. Abutting lands may, therefore, within five years be assessed for improving a street by grading, etc., and for constructing a sewer in it, although the cost of both assessments exceeds twenty-five per cent. of the value of the lands.
2. The value of abutting lands fixed by the superior court in a suit to enforce assessments for street improvements, is not conclusive in an action to enforce assessments for the construction of a sewer.
3. The fact that the sewer is of no actual benefit to the defendant's property is immaterial.
4. Where the court reduces an assessment because it is more than twenty-five per cent. of the value of the property, no penalty can be recovered. But where assessment is not reduced defendants should pay interest and penalty.
5. Where the assessment is not reduced the costs will be equally divided between the plaintiffs and defendants.

Hamilton Probate Court.

HOLLISTER, J.

This case involves the validity of a sewer assessment of \$2.00 a front foot.

The defendants claimed that a sewer improvement is a street improvement, and that abutting lands cannot within five years be assessed for both improving the street by grading, etc., and for constructing a sewer in it, when the cost of both assessments exceeds twenty-five per cent. of the value of the lands, as in these cases.

The court holds that this claim of double assessment fails; and with it fails also the contention that the values of the properties fixed by the superior court in the suit brought to enforce the assessments for the street improvements are not conclusive in this case, for the subject of action in the two cases is different; that the sewer is of no actual benefit to the defendant's property is immaterial. In cases where the court reduces an assessment because it is more than twenty-five per cent. of the value of the property, no penalty can be recovered; but in cases where the assessment is not reduced the defendants should pay interest and penalty; where the assessment is reduced the plaintiffs must pay the costs; where the assessment is not reduced the costs will be equally divided between the plaintiffs and the defendants.

NOTARIES PUBLIC.

[Hamilton Common Pleas, 1896.]

IN RE S. B. HAYMAN, NOTARY PUBLIC.

A notary public who certifies in blank to receipts for salary of a public officer or employee, is guilty of misconduct in office, justifying his removal.

WRIGHT, J.

The court found that S. B. Hayman had unfaithfully discharged his duties as a notary public, and was removed from office, as a notary public of Hamilton county, and ordered to pay the costs. The entry directs that a copy of the charges and specifications, and of the judgment of the court, be forwarded to Governor Bushnell.

Hayman's offense was that of certifying in blank to receipts for salary, afterwards fraudulently filled out by George Hobson, and the money collected on them by him. The excuse offered to the court for so doing was that he, Hayman, expected to be present when the receipts were signed by the persons who were to sign them, but after the receipts passed to Hobson's hands he was unable to get them back again, and had no notice as to when they would be filled out.

ATTACHMENT—SLOT MACHINE.

[Magistrate's Court, Millcreek Township, Hamilton Co., August, 1897.]

I. P. WISE V. IKE MARTIN.

An attachment will lie in a suit to recover money lost in a slot machine.

HEARD on motion to dismiss the attachment.

MACKELPESH, J.

The plaintiff claims the sum of fifteen and seventy-five one hundredth dollars (\$15.75) for money lost and paid to defendant on account

of a scheme of chance, commonly known as a slot machine, at Chester Park, July 27, 1897.

An attachment was issued under the provisions of sec. 6489, Rev. Stat.

It is claimed by the defendant, on a motion to dismiss the attachment, that the transaction upon which the action is brought is a gambling contract and therefore void, and that an attachment will not lie upon such contract. Citing the case of *Kahn v. Walton*, 46 O. S., 195.

This was a case where the plaintiff below sought by injunction to restrain the bank, upon which certain checks were drawn in a wheat gambling transaction, from paying the checks, and the court held that both parties were *in pari delicto*, and that the relief sought could not be granted.

In the present case, however, an attachment is brought, not under a contract, but under the provisions of the statute.

Attachment is a provisional remedy whereby the defendant's property is placed in the custody of the law to secure the interests of the creditor, pending the determination of the action.

The grounds upon which an attachment may be had are defined by statute, and an attachment based upon those grounds will lie, independent of the cause of action in aid of which it is issued.

"The nature, validity, existence and justice of the cause of action cannot be inquired into on the motion to discharge the attachment."

Alexander v. Brown, 2 Disney, 395; see also opinion of Judge Ricks, U. S. District Judge, to same effect in *Jenks v. Richardson*, 1 F. D. 188.

The statute provides that an attachment may be had in a civil action for the recovery of money where the defendant has fraudulently or criminally contracted the debt or incurred the obligation for which suit is brought; and the Supreme Court has held, in *Sturdevant v. Tuttle*, 22 O. S., 111, that where the element of crime is present the term obligation, in the statutory sense employed, is equivalent to liability, and that attachment would lie to recover damages, as in the case then under consideration for assault and battery.

This leads to the inquiry whether the liability incurred in this case results from crime.

The device used in the transaction which is the cause of this action is known as a slot machine, and is operated by inserting in a slot at the top a coin which finds its way into one of several compartments at the bottom, according as it is deflected to one side or the other by pegs or other obstructions against which it may chance to strike.

In my opinion it is clearly within the definition of a gambling machine, in sec. 6934, Rev. Stat., the keeping of which for the purpose of gambling is punishable by fine and imprisonment, and is therefore a crime under the laws of this state.

Whether, therefore, the transaction complained of was in the nature of a contract void for illegality, it is not necessary to inquire.

The plaintiff is entitled to his remedy of attachment. He seeks neither damages for, enforcement of, or rescission of any contract, void or otherwise.

For this reason also the provisions of sec. 4269, Rev. Stat., declaring all gambling contracts void, are inapplicable.

It is claimed by defendant that his relation in the use of the machine is that of a dealer, who is entitled to, and liable for, only the commission he receives from its operation by the public. But the defendant, who,

Magistrate's Court, Hamilton County.

in this case, through his employee is the dealer, is also the owner of the machine, and but one person at a time can play against him by depositing money in the slot. After being placed in the slot it passes from the control of the depositor, and should his coin fail to open one of the compartments, he gets nothing in return.

It is self-evident that the owner of a gambling machine cannot by law be compelled to leave it open for public play, and he has therefore the right to withdraw it at any time. His leaving it out with the coin deposited by the last player still in the compartments is merely an inducement or bait to others, and he cannot thereby constitute the last player an antagonist of the next, and thus conclude his right of recovery to all he has lost, under the plea that he (the owner) stands in the position of a dealer, and that the other two play against each other and not against him.

The motion to dismiss the attachment will be overruled.

A. L. Meinicke, for plaintiff.

Pogue & Pogue, for defendant.

INDICTMENTS.

[Champaign Common Pleas, 1896.]

STATE OF OHIO V. Z. T. LEWIS.

1. The fact that the foreman of a grand jury signed his name to the indictment in the wrong place, so that he appeared as clerk rather than foreman, is not sufficient ground upon which to quash an indictment.
2. In order to show that different indictments are for the same offense, it is necessary to attack the proceedings by a plea in bar.

HEISERMAN, J.

It appears that when Z. T. Lewis, the bond manipulator, was indicted by the grand jury that his attorneys filed a motion to quash one indictment on the ground that the foreman of the grand jury had signed the indictment as a clerk and not as foreman. A motion was also filed to require the prosecuting attorney to elect upon which indictment Lewis would be tried. They also filed a plea in abatement, on the ground that twenty indictments had been returned for the Farmers' Bank of Mechanicsburg and ten for the Perpetual Building Association of Urbana. The attorneys held that as the bonds in these transactions had all been deposited at the same time there could be but one offense in each case and not a separate indictment for each bond. The court overruled all motions. In the motion to quash the indictment on the ground of its not being properly signed by the foreman of the grand jury, the court overruled the motion because the record of the court showed that L. H. Runyan was foreman of the grand jury and because he signed his name in the wrong place was not sufficient grounds to quash the indictments. The motion to require the prosecutor to elect on which indictment the accused should be tried was also overruled. In the matter of the plea in abatement the court held that the proper proceeding was to show that the different indictments were in fact the same offense; it would be necessary for counsel for defense to attack the proceedings by a plea in bar.

COUNTIES.

[Hamilton Common Pleas, 1896.]

SUMMERS V. HAMILTON Co.

1. A county is not a legal person, natural or artificial, and is not capable of suing or being sued.
2. A county is a local political sub-division of the state, created by the sovereign power of the state without particular consent or concurrent action of the people who inhabit it.

JELKE, J.

In this case it is held that the action must be dismissed at plaintiff's costs, because plaintiff has sued nothing, Hamilton county not being a legal person, either natural or artificial, capable of suing or being sued. A county is a local political sub-division of the state, created by the sovereign power of the state without particular consent or concurrent action of the people who inhabit it.

COLLATERAL INHERITANCE TAX.

[Hamilton Probate Court, 1896.]

EST. OF WM. J. ORMSBY.

Half-brothers are exempt from collateral inheritance tax.

FERRIS, J.

The court held, in the matter of the estate of Wm. J. Ormsby, that half-brothers are exempt from payment of the collateral inheritance tax.

FISH-NETS—UNLAWFUL FISHING.

[Cuyahoga Common Pleas, 1896.]

IN RE FISH SEIZURE.

That part of the law which authorizes the seizure and confiscation of the nets of parties engaged in unlawful fishing, is against the constitution of the state and the constitution of the United States, in that it allows the confiscation of private property without due process of law.

ONG, J.

This case grows out of the seizure of a number of fishing nets by the fish wardens in Lake Erie in 1895.

The owner of the nets commenced suit in replevin against the fish wardens and the owners of the tug which the wardens used. The nets were not recovered by this process, and thereupon the owners commenced an action in the common pleas court to recover the value of the nets taken. The attorneys for the defendants maintained that, under the law, plaintiff could not recover for the seizure of fishing nets taken while the plaintiff was engaged in unlawful fishing. They declared that the law allowed the confiscation of fishing nets under the circumstances.

Cuyahoga Common Pleas.

In charging the jury the court plainly told them that neither the warden nor any one else had the right to confiscate the nets. He declared that any law which allowed the confiscation of nets was unconstitutional. He further said that under the law the state could confiscate the property of a citizen without condemnation proceedings. Such a law, he insisted, was against the state constitution and the United States constitution, in that it allowed the confiscation of private property without due process of law. With this instruction in mind the jury rendered a verdict in favor of plaintiff for the value of the nets confiscated.

That part of the law which the court declares to be unconstitutional is as follows:

"No person shall draw, set, place, locate or maintain any fish-net, trap, pound net, seine, gill nets, or any device for catching fish, as is by law forbidden; and any nets, seines, pound nets, gill nets, placed, located or maintained in violation of the provisions of the laws of the state, shall be taken wherever found by the fish wardens or other proper officer; and all such nets and other devices for catching fish are hereby declared a public nuisance and shall be forfeited to the state.

"It shall be the duty of any warden, deputy warden, inspector of fish, sheriff, constable, special warden or other officer having jurisdiction, forthwith to take up such nets, devices and articles hereby declared a public nuisance, when found or taken in unlawful use, and hold the same until disposed of according to law.

"In such prosecutions * * * the court shall, upon conviction, adjudge in addition to the fine and costs by law imposed the forfeiture of such nets."

STOLEN MONEY.

[Magistrate's Court, Cincinnati Township, December, 1896.]

LAVINA PRICE V. JOHN C. SCHWARTZ, PROS. ATTY.

1. Title to money which has been stolen and paid by the thief to an innocent party, in the ordinary course of business, passes to such innocent party.
2. Where the money, in the form of a \$100 bill, having passed into the hands of an innocent holder, is surrendered to the city to be used in the trial of the thief and the city subsequently pays a sum equivalent to the bill to the innocent party, the city thereby acquires title to the bill.

KUSHMAN, J. P.

The \$100 bill was stolen from Lavina Price by Mollie Lewis, who paid a freight bill of \$4 to the Little Miami Railroad Co., receiving \$96 in change, which she got away with before being arrested. The police traced the bill to the railroad company, and got it from them to use as evidence. Three or four days afterwards the railroad company wanted to balance their accounts, and called on the police department, who refused to turn over the bill, saying they were holding it as evidence. The railroad company called upon Mayor Caldwell, who ordered Police Court Clerk Bender to pay out of city funds \$100 in currency in place of the bill, which was done. The Lewis woman was convicted in the common pleas court and received two years in the penitentiary.

After she had been convicted, the Price woman, through Attorney Sparks, swore out a writ of replevin against Prosecutor Schwartz, in

whose hands the bill then was, having been used as evidence. The case came on for hearing. Frank M. Coppock, appearing at the request of Prosecutor Schwartz, moved the court to make the city of Cincinnati a party defendant, as it was the real party in interest. Mr. Sparks objected, and the objection was overruled and exception taken.

There was no dispute as to the facts. Mr. Coppock claimed that the railroad company, having come into possession of the bill in the usual course of business, was in the position of an innocent purchaser of a negotiable instrument, and the courts have held that an innocent purchaser of a negotiable instrument acquires title to the same. If the railroad company had acquired title the city had also. Mr. Sparks claimed that the city of Cincinnati paid \$100 in place of the bill, with its eyes open, knowing at the time it was stolen property.

The court said that while he was sorry for the Price woman, and it was hard for her to be the loser, he must hold that the law and common sense were against her. Would any sensible man say that a business man would have to ask a purchaser, in the ordinary course of business, when he was presented with a bill: Where did you get it? Is it stolen? The court thought not, and as there was no question that the railroad company came into possession of the \$100 bill in the usual course of business, they had a good title to it; and if they had a good title, they had a right to give it to the city, or exchange it, as was done, or burn it if they felt so disposed.

The court finds that the city of Cincinnati was entitled to the possession of the \$100 bill at the commencement of the action, fixing the damage at one cent and the value of the goods at \$100. •

Notice of appeal was given.

COLLATERAL INHERITANCE TAX.

[Hamilton Probate Court, 1897.]

IN RE INHERITANCE TAX.

Inasmuch as "all property which shall pass * * * shall be liable to a tax of five per centum of its value above the sum of \$2,000," it matters not whether the property passes under one or more items of the will, or whether property passing under more than one item be real or personal, the tax is collectable on the aggregate of such property, less \$200, which is exempt.

FERRIS, J.

Where in separate items of a will, two or more legacies or devises are given to the same non-exempt persons, does the inheritance tax law allow a \$200 exemption on each legacy, or is there to be but one such exemption on the aggregate taken by such person? The court, in answering this question, held that as "all property which shall pass * * * shall be liable to a tax of five per centum of its value above the sum of \$2,000," it matters not whether the property pass under one or more items of the will, or whether the property passing under more than one item be real or personal, the tax is collectable on the aggregate of such property, less \$200, which is exempt.

MORTGAGES.

[Franklin Common Pleas, 1897.]

IN RE ASSIGNMENT OF MORTGAGE.

If the assignee of a mortgage fails to have the same recorded he makes the party to whom the mortgage was originally payable, his agent, and his claim holds no priority over innocent persons.

EVANS, J.

The court holds that the assignment of a mortgage must be made a matter of record in the county recorder's office, and that if the assignee of the mortgage fails to have the same recorded he makes the party to whom the mortgage was originally payable, his agent, and his claim holds no priority over innocent persons. The decision is based principally upon the laws of 1888, 85 O. L., 284, and the case of *Holmes v. Gardner*, decided in 50 O. S., 167.

BUILDING ASSOCIATIONS.

[Hamilton Common Pleas, 1897.]

IN RE BUILDING ASSOCIATION.

1. Members of a building association, in the event of its insolvency, are liable to contribute in the same proportion in which they would be entitled to share in profits.
2. Where, under the present law, the association limits, by its constitution, the mortgage members from sharing in any profits except as to dues paid into the credit of capital during each current year, so is their liability to contribute to losses and expenses limited thereto.

BUCHWALTER, J.

Members of an insolvent association are liable to contribute in the same proportion in which they would be entitled to share in any profits; and when, under the present law, the association limits by its constitution the mortgage members from sharing in any profits except as to dues paid into the credit of capital during each current year, so also is their liability to contribute to the losses and expenses of the association limited thereto.

BUILDING ON LEASED LAND.

[Hamilton Common Pleas, 1897.]

IN RE BUILDING LEASE.

1. The buildings contemplated by the provision in a lease that lessor should pay "the cash value of all good and fitting permanent brick buildings, suitable to the location, that may be on said leased premises at the end of the term aforesaid" are such brick buildings as are of good materials, well put together, and which, in point of construction, architecture, height, appearance, age and adaptability for use and occupancy, compare favorably with buildings in that locality, and are strong, durable and capable of being useful for many years to come.

In re Building Lease.

2. By "location" is meant, for the purpose of the case, "that part of town," "the vicinity" or "the neighborhood," including such an area as that, within it, a man of ordinary intelligence, with ordinarily good eyesight, standing at the intersection of streets, and looking in both directions on street on which said buildings are located, can distinguish the height, general character and general appearance of buildings.
3. The measure of damages is the cost of the buildings in question, new at the expiration of the lease, less depreciation through age, wear and tear, from the time of construction to the date of expiration of the lease.

CHARGE TO JURY.

HOLLISTER, J.

This case was brought on a covenant in a lease of the property at the southwest corner of Vine and Seventh in Cincinnati for twenty years, expiring January 1, 1895, wherein the lessor agreed with the lessee to pay him the cash value of all good and fitting permanent brick buildings, suitable to "the location, that may be on said leased premises at the end of the term aforesaid."

The judge charged the jury that the kind of buildings contemplated by the parties were "such brick buildings as the lessee would leave on the premises at the expiration of the lease, as were composed of good materials, well put together; which, in point of construction, architecture, height, appearance, age and adaptibility for use and occupancy, would compare favorably with the permanent buildings in that locality; and that the buildings were not to be of a temporary character, but were to be substantial, strong, durable, lasting and capable of being useful, not for a few years, but for a great many years to come," and the jury were directed that "by location" is meant for the purpose of this case, "that part of town," "the vicinity," "the neighborhood," including and comprehending such area as that, within it, a man of ordinary intelligence, with ordinarily good eyesight, standing on the corner of Vine and Seventh, and looking northwardly and southwardly on Vine street and eastwardly and westwardly on Seventh street, might distinguish the height, general character and general appearance of buildings; and that the measure of damages was the cost of the buildings in question new on the first of January, 1895, less depreciation to the buildings through age and wear and tear from the time of construction to January 1, 1895.

DEBTORS AND CREDITORS—ITINERANT CLOTHIERS.

[Franklin Common Pleas, 1897.]

IN RE ITINERANT CLOTHIERS.

1. Under the statute of Ohio the rights of creditors of itinerant clothiers that come into this state to do business are placed upon an equal footing, where their claims arise on transactions within the state.
2. One creditor has no advantage over other creditors because false representations were made when the debt was created.

EVANS, J.

This case involves the rights of itinerant clothiers that come into this state to do business. The court held that under the language of the statute the rights of such creditors are placed upon an equal footing where their claims arise on transactions within the state, and that no

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Franklin Common Pleas.

creditor "has the bulge" over another creditor because false representations were made when a debt was created. In other words, so far as the creditors are concerned, the first one in with an execution stands the best show, and that if the legislature intended to make the law operate any other way, they failed to express it in language which the courts can use in enforcing the law.

COUNTY COMMISSIONERS—SCHOOLS.

[Highland Common Pleas, 1897.]

STATE EX REL. V. MACKINNON.

County commissioners have the right, and it is their duty, to elect a superintendent for the public schools, when the school board fails to agree upon a selection.

NEWBY, J.

This case involves the question as to the right of the county commissioners to elect a superintendent for the London public schools, the school board having failed to agree upon the selection of one. A petition was presented to the commissioners, and that body, after giving all parties a chance to be heard, elected Prof. J. W. MacKinnon, who had been superintendent of the London public schools for the past nineteen years. The members of the board which had been fighting Mr. MacKinnon, instituted proceedings in the common pleas court. The court held that the commissioners had the power to take the action they did if they found the facts to exist which, under the law, made it their duty so to act.

ATTACHMENT—DAMAGES—HUSBAND AND WIFE.

[Magistrate's Court, Columbus Township, Franklin Co., 1897.]

MAGGIE AULT V. JONES, WITTER & CO.

1. Damages for an attachment which is dissolved cannot be awarded unless it is shown that the attachment was a malicious prosecution.
2. Service upon a wife, who does not live with her husband, is not obtained by leaving summons at the residence of the husband.

ROACH, J. P.

This suit was the result of an attachment brought by the firm against the plaintiff about a year ago, but which was subsequently dissolved. The woman then sued the firm for \$300 damages alleged to have been sustained by the wrongful detention of her household goods which were attached. Held, that damages could not be awarded unless it was shown that the attachment was a malicious prosecution, and as that was not shown the suit was dismissed.

In another suit, by a landlord against a husband and wife, as tenants, in which the plaintiff sought to recover a certain amount of money due for rent, a motion was filed by the defendants in which they sought to quash the service in the suit, on the ground that they do not live

Ault v. Jones, Witter & Co.

together, although they are husband and wife. The claim was made that since the wife does not live in the county there was no service. The plaintiff held that although the wife did not live with her husband, service at his residence was sufficient. It seems that no higher court had ever passed on this question, and the justice, acting on his own opinion, granted the request of the defendants.

JUDICIAL NOTICE—CONTRACTS MADE ON SUNDAY.

[Hamilton Common Pleas, 1897.]

STEPHEN WARREN V. FOUNTAIN SQUARE THEATER CO.

1. Courts will take judicial notice of the coincidence of the days of the week and the days of the month, and will, accordingly, read into a petition that a certain day of the year fell on Sunday.
2. A contract for a seat at a theatrical performance made on Sunday is illegal.

BUCHWALTER, J.

Stephen Warren, colored man, sued the Fountain Square Theater Co., of Cincinnati, for \$500 damages, alleged to have been caused because of his exclusion from the parquet of the theater on account of his color, although he had purchased a ticket for that part of the house, which he says was a violation of his constitutional rights. The ticket was for a performance given on October 4th of this year.

The court held that courts will take judicial notice of the coincidence of the days of the week and the days of the month, and that it will accordingly be read into the petition that October 4th of this year fell on Sunday, and that from this it follows that the contract with the defendants was for a theatrical entertainment on Sunday, and that therefore it was an illegal contract and not enforceable, and therefore no recovery can be had for breach of it by exclusion of the plaintiff from the theater.

TAXATION—JUDICIAL SALES.

[Hamilton Common Pleas, 1896.]

SCHMID V. SCHMID.

The rights of a purchaser at a judicial sale, as to payment of taxes out of the proceeds, are fixed by date of sale, and after confirmation relate back to that date.

BUCHWALTER, J.

Heard on application by the purchaser of property at a partition sale for an order for payment out of the proceeds of the taxes for 1897, levied in 1896: Held, that, by sec. 2854, Rev. Stat., it was the duty of the court in judicial sales to order taxes paid out of the proceeds, and that it is the duty of the county auditor, under sec. 1042, Rev. Stat., to deliver to the county treasurer a tax duplicate for the year's levy on or before October 1st of each year, this date being fixed by our Supreme Court, in the case of *Hoglen v. Cohan*, 30 O. S., 436.

ERROR.

[Hamilton Common Pleas, 1897.]

HERN V. BEVINGTON.

1. The act amending secs. 595, 6560 and 6565, Rev. Stat., 90 O. L., 358, does not amend Sec. 6723, Rev. Stat., or limit to ten days the six months' time therein provided for beginning proceedings in error to vacate a final judgment.
2. The amendatory act appears to make it the duty of the justice to certify his proceedings to the clerk of the common pleas court within ten days.

BUCHWALTER, J.

HEARD on motion to dismiss proceedings in error in the Hamilton Common Pleas.

It appeared that a trial was had before a magistrate and judgment rendered July 10, 1896; a motion for a new trial was overruled, and a bill of exceptions filed, allowed and signed July 13, 1896. The petition in error was filed, by the plaintiff August 8, 1896. Held, that the act amending secs. 595, 6560 and 6565, Rev. Stat., 90 O. L., 358, does not amend sec. 6723, Rev. Stat., or limit to ten days the six months' time therein provided for beginning proceedings in error to vacate a final judgment, and that the amendatory act appears to make it the duty of the justice to certify his proceedings to the clerk of the common pleas court within ten days, but that the procedure in this common pleas court by petition in error as theretofore provided to be filed by the complainant, is not amended.

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DOWER—MORTGAGES.

[Hamilton Court of Insolvency, 1897.]

IN RE DOWER.

Where wife of assignor joins in a mortgage, which, though unrecorded, is good between the parties, and upon distribution claims her inchoate right of dower, then assigning to one who has knowledge of the mortgage as a witness, in payment of a debt, she is entitled to dower, but it must be subrogated to the mortgage so far as necessary to satisfy the claim.

MCNEIL, J.

Held, that where the wife of an assignor joined in a mortgage, and at the hearing for a distribution claimed her inchoate right of dower, and then assigned this right to another in payment of a debt, that she was entitled to have her inchoate right of dower ascertained, but inasmuch as she joined in the mortgage, which, although unrecorded, is good as between the mortgagors and mortgagees, and her assignee having knowledge of the existence of the mortgage, by reason of being a witness to its execution, the dower upon distribution must be subrogated to the mortgage so far as necessary to satisfy his claim.

Echelman v. Heil.

ALIMONY.

[Franklin Common Pleas, 1897.]

MIESSE V. MIESSE.

The statutes do not authorize the seizing of the property of a non-resident husband to enforce the payment of alimony.

EVANS, J.

Motions to dismiss the petition filed by Mrs. Miesse v. Charles E. Miesse, on the ground that the defendant had not been served and the court had no jurisdiction. It appears that Miesse secured possession of his children and fled to Dakota, and that his abandoned wife then entered suit for alimony and enjoined Miesse from disposing of his property. Personal service could not be secured upon him, and under the ruling these suits must fall to the ground. The court holds that the statutes did not authorize the seizing of the property of a non-resident husband to enforce the payment of alimony.

DIVORCED WIFE—LIFE INSURANCE.

[Hamilton Common Pleas, 1897.]

IN RE INSURANCE POLICY.

A divorced wife is entitled to proceeds of a policy of insurance, she having been named as beneficiary and subsequently divorced.

BUCHWALTER, J.

Held, in the case of Overheiser v. Mutual Life Ins. Co., that a divorced wife is entitled to the proceeds of a policy of insurance, she having been named as the beneficiary and divorced subsequent thereto.

BILLS OF EXCEPTIONS.

[Hamilton Common Pleas, 1897.]

ECHELMAN V. HEIL.

A bill of exceptions allowed by a magistrate on the fourteenth day after the trial is not a valid bill, the statute not permitting a magistrate to extend the time for presenting a bill beyond ten days.

BUCHWALTER, J.

Held, in the case of Echelman v. Heil, that a bill of exceptions allowed by a magistrate on the fourteenth day after trial was not a valid bill, the statute not permitting a magistrate to extend the time for presenting a bill beyond ten days.

SALOONS—DOORS AND WINDOW SCREENS.

[Fayette Common Pleas, 1897.]

WASHINGTON (CITY) V. GALLAGHER.

An ordinance requiring all screens to be removed from the doors and windows of saloons is constitutional.

MAYNARD, J.

Gallagher was arrested for violating the ordinance requiring all screens to be removed from doors and windows of saloons. The court sustains the opinion of the mayor that the anti-screen ordinance is constitutional.

DIVORCE AND ALIMONY.

[Franklin Common Pleas, 1897.]

SHARP V. SHARP.

A decree for alimony may be enforced by the husband, as heir of the divorced wife, against her first husband, after her death.

BADGER, J.

The case arose from the following statement of facts: In November, 1888, one William Sharp married Mary E. Williams. One year later she sued for a divorce, but failed to make her case; subsequently in 1892 she again sued for divorce, and was this time successful and got a decree, and was also awarded \$300 alimony, but at that time Sharp was insolvent. Two years later Mrs. Sharp married a man by the name of Perry; she died leaving her husband as sole heir, an administrator was appointed, and as Sharp's mother had died in the meantime, leaving him an interest in her farm, the administrator sought to collect the \$300 alimony judgment. Sharp brought suit to set aside the alimony decree, as it would have to be paid to the husband of his dead wife. The attorney for the administrator demurred to this and the court sustained him in his demurrer, and Sharp will now be compelled to pay the amount and settle with the widower of his divorced wife.

STREET RAILWAYS.

[Hamilton Probate Court, 1897.]

†CIN. INC. PLANE RY. CO. V. CINCINNATI.

1. An extension of a steam railroad may be had under the provisions of the law, as a steam railroad, but a steam railroad cannot be extended as a street railroad.
2. And a street railroad, operating under a charter authorizing a steam railroad, cannot be extended by condemnation or appropriation.
3. The control and regulation of the streets, alleys and highways of the city of Cincinnati are in the municipal boards; the revenue derived for the use of the streets is the exclusive property of the city, and the right to define and determine the mode of the use of streets, as well as the conditions under which they should be used, is an exclusive privilege given by the statute to municipal authorities.
4. Such rights are not, in the purview of the law, to be fixed by proceedings in condemnation or appropriation.

† For another decision in this case, see 7 Dec., 2.

Railway Co. v. Cincinnati.

FERRIS, J.

In the matter of the Main Street Electric Road of Cincinnati, for authority to condemn certain rights of way through the streets of Cincinnati. It will be remembered that the injunction granted by Judge Smith, of the superior court, Cincinnati (City) v. Cin. Inc. Pl. Ry. Co., 6 Dec., 81, was for the purpose of enabling the Main Street Company to make satisfactory arrangements with the municipal boards looking to the obtaining of a franchise. The limit of time granted by Judge Smith was six months, and during this period the company has been actively engaged in an ineffectual endeavor to secure through the board of legislation as well as through the board of administration the necessary consents. The ordinance that was introduced in the board of legislation, was referred to a committee, and after a full discussion in the board, sitting as a committee of the whole, was indefinitely postponed, and a motion to reconsider was lost. It was then that an appeal was taken to the courts and a petition filed in the probate court, praying for authority to appropriate the streets or so much of them as might be necessary to the use of the Main Street Company for its tracks, in the operating of a street railroad. The petition also asked that the court, through the intervention of a jury, should ascertain the measure of damages, fix the tenure and determine what amount should be paid for the privilege sought.

The case occupied many days in hearing, and, as the facts were substantially agreed upon, the questions passed upon by the court were largely those of law.

The court found from the evidence that the charter defining the rights of the company limited the organization to the construction and operation of a railroad between a point in the city of Cincinnati and one in the village of Avondale, and that such charter, granted under the law in force in May, 1852, and subsequently amended by the act of April, 1877, referred to a steam railroad or commercial railroad, and by the provisions of the law expressly excluded all reference to a street railroad.

The court held that by the adjudications had both in the federal and state courts upon the charter rights of the plaintiff company, there was no escape from the conclusion that the Main Street Electric Railroad Company was operating a street passenger railroad under a charter which gave no such authority; that an extension of a steam railroad might be had under the provisions of the law, as a steam railroad, where the power of appropriation would lie, but that a steam railroad could not be extended as a street railroad any more than a street railroad could be extended as a steam railroad; that in law there was a plain distinction everywhere manifest in the decisions between a railroad—referring to steam railroads—and a street railroad; that while the power of appropriation of franchises that would carry with it the right to the use and occupancy of the street, could, under sec. 3283, Rev. Stat., be found relating to railroads, there was nowhere in the statute any authority for the appropriation of property rights by a street railroad for street railway purposes, and, therefore, it followed that there could be no authority for the extension or construction of a steam railroad under the guise of a street railway. The statutes pointed out the manner in which street railways could obtain their franchises, giving them the right to the use, occupation and enjoyment of streets through an application made under law to the municipal boards.

The court held that under the law as it now exists, the control and the regulation of the streets, alleys and highways of the city of Cincinnati

Union Common Pleas.

nati were in the municipal boards; the revenue derived for the use of the streets was by law the exclusive property of the city, and the right to define and determine the mode of the use of the streets, as well as the conditions under which they should be used, was an exclusive privilege given by the statute to municipal authorities. Such rights are not, in the purview of the law, to be fixed by proceedings in condemnation or appropriation. The court held that the policy of the law was to view such powers as were sought to be invoked in this proceeding strictly, and that in the event of any doubt such doubt should be resolved against the grant.

After citing a long list of authorities in support of these propositions, the court denied the application and dismissed the petition.

MECHANICS' LIENS.

[Lancaster Common Pleas, 1897.]

IN RE MECHANICS' LIEN LAND.

1. The decision of the Supreme Court, in *Palmer & Crawford v. Tingle*, 55 O. S., 423, declaring invalid those sections of the mechanics' lien law, 91 O. L., 135, permitting the sub-contractor to take a lien on a building for the construction of which he has furnished material, does not invalidate the entire law.
2. The right of the original contractor to have a lien on a building which he has erected, is not affected by said decision.

WRIGHT, J.

The recent decision of our Supreme Court declaring unconstitutional those sections of the law which permitted the sub-contractor to take a lien on a building for the construction of which he had furnished material, did not invalidate the entire law. The court further holds that the right of the original contractor to have a lien on a building which he had erected, was not affected by the recent decision of our Supreme Court. Had the judge held adversely, the effect of his decision would have amounted to a declaration that the state of Ohio had no mechanics' lien law.

FISH LAWS.

[Union Common Pleas, 1897.]

STATE OF OHIO v. MODER.

The law as amended, 92 O. L., 332, does not prohibit the shooting of fish.

Dow, J.

The case arose over the fact that one Moder shot some fish in Mill creek last summer, and was arrested by the game warden and brought before a justice of the peace, who dismissed the case. The case was then taken to the court of common pleas on mandamus, to compel the justice to assess a fine. The court dismissed the case, on the grounds that the law as amended, 92 O. L., 332, does not prohibit the shooting of fish.

In the Matter of Herckelrath Estate.

UNITED STATES CONSUL—DEPOSITIONS.

[Hamilton Probate Court, 1895.]

IN THE MATTER OF HERCKELRATH ESTATE.

1. Under the laws of Ohio a United States consul is not authorized to act as a notary public in the taking of depositions.
2. Depositions taken before a United States consul in a foreign port are, therefore, inadmissible as evidence in the state courts.

FERRIS, J.

Depositions taken before a United States consul in a foreign port are inadmissible as evidence in the state courts. There is a United States statute which makes such depositions competent testimony, but it has been held that congress cannot legislate for the states, and the act in question only applies to depositions offered in evidence in the United States courts. In view of this holding and the absence of any Ohio statute settling the question, Judge Ferris came to the conclusion that under the laws of Ohio a United States consul is not authorized to act as a notary public in the taking of depositions.

RECEIVERS.

[Hamilton Common Pleas Court, 1896.]

IN RE BESUDEN CO.

1. The comity between states will permit a receiver to collect money due the firm he represents in a state other than the one in which he was appointed, provided no injury is done to a resident in such state.
2. Therefore, creditors bringing attachment suits in other states, and reaching money due the firm represented by the receiver, are interfering with such receiver in the discharge of his duties, and unless they dismiss the suits may be punished for contempt of court.

SAYLER, J.

The Eberhardt Manufacturing Company and John McGrath, its agent, sued the Besuden Company at Louisville, Ky., and at Cairo, Ill., for money alleged to be due, and garnisheed funds in the possession of debtors of the Besuden Company in those places. The receiver of the Besuden Company thereupon filed charges of contempt, alleging that the creditors mentioned were interfering with him in the discharge of his duties as an officer of the court.

At the hearing it was claimed by the defense that the jurisdiction of the receiver did not extend beyond the jurisdiction of the court by which he was appointed, and, therefore, he could not have collected the accounts due in any other state as against creditors. The court held that while that was true, yet the courts had held that the comity between states would permit a receiver to collect money due the firm he represented in a state other than the one in which he was appointed, providing no injury was done to a resident in that state. In this case there would have been no injury done to a resident of the states where the debts were owing, and if the attachment suits had not been brought the receiver would have been allowed to collect the money due. Therefore the persons bringing the attachment suits were interfering with the receiver, and if they did not dismiss the suits they would be punished for contempt.

SALE OF THEATRE TICKETS.

[Hamilton Common Pleas, 1896.]

CINCINNATI (CITY) V. GEO. BRILL.

1. A city council has the right to reasonably regulate the actions of theatrical managers in the operation of their business.
2. An ordinance providing that it shall be unlawful for any person to sell reserved seats for a theatrical or other performance after the doors of the theatre have been opened, is within the rule above stated.
3. The fact that the seats were purchased and reserved the day before would not exempt the seller from the operation of the law.
4. If a speculator buys tickets, he becomes, in effect, an agent of the house and liable under the ordinance in question.

WILSON, J.

The case was that of George Brill, who was arrested for selling tickets for the Fountain theatre in the street in front of the house. He was arrested under a city ordinance, passed in 1872, which provides that it shall be unlawful for any person to sell reserved seats for a theatrical or other performance after the doors of the theatre have been opened. Brill was convicted in the police court and fined five dollars. There was a petition in error filed and the case taken to the common pleas court for review.

There were several grounds of error. It was alleged that the ordinance was invalid for the reason that the council of the city had no right to pass it. The court held that under the statutes the council had the right to regulate in a reasonable way the actions of theatrical managers in the operation of their business.

Another ground was as to the right of a person to buy tickets for his own use and sell them. This was the vital point in the case, so far as the rights of the managers and speculators are concerned. Judge Wilson held that under the law there could not be any reserved seats sold after the doors of the theatre had been opened to the public. If a person should buy the tickets and sell them in the lobby of the theatre, for instance, the fact that the seats had been purchased and reserved the day before would not alter the case, as it would be simply an attempt to evade the law, and the public would not be benefited by the terms of the law. The purpose of the regulation was to place the public on an equal footing after the doors of the theater had been opened, so that a person buying a ticket after the doors of the theatre had been opened would have the right to take any seat in the house that had not been sold as reserved before the doors were opened, and sold, too, to a person for his individual use, and not for speculation.

If a speculator bought tickets he would be in effect an agent of the house, for he would place himself in the same position as the person in the box office selling tickets, and who would be liable under the ordinance for selling reserved seats after the doors were open.

Fath v. Village of Clifton.

FAIRS—SALE OF LIQUOR.

[Lorain Common Pleas, 1896.]

STATE OF OHIO V. BLANK.

Whether a fair is in session, within the meaning of the statute prohibiting the sale of liquor within two miles of the grounds, on the day for the production and arrangement of exhibits, and no charge is made for admission, *quære*.

PER CURIAM.

Prosecution against saloon keepers for selling liquor within two miles of the fair ground, at Elyria while the fair was being held, under an indictment, the first count of which was for selling on the first day of the fair, the others on the following days following. He charged the jury in regard to the first count: "It appears that Tuesday, September 24, 1895, was a day for the production and arrangement of exhibits to said fair, and no charge was made for admission. I am of the opinion that said fair was not in session, and that the fair was not being held as contemplated by the statute on that day; therefore the defendant could not be found guilty on that charge." The judge afterwards expressed some doubt as to the position he had taken, and expressed himself as unwilling to have the ruling stand for other pending cases for similar offenses.

MUNICIPAL CORPORATIONS.

[Hamilton Common Pleas, 1896.]

ANNA FATH V. CLIFTON (VILLAGE.)

A contract awarded under an advertisement for proposals made on the tenth or last day of the advertisement of an improvement ordinance is illegal. The advertisement for such proposals should not be made prior to the eleventh day.

WILSON, J.

The village council passed an ordinance for the improvement of West avenue, and advertised the ordinance for ten days, as the law requires, at the expiration of which time it would take effect. On the tenth day of the advertisement they advertised for proposals to do the work. The suit was brought to enjoin the village entering into a contract with the successful bidder, for the reason that advertisement for proposals was illegal, the claim being made that the village should not have advertised for the proposals on the last day of the advertisement of the ordinance, as the ordinance had not taken effect at that time. It could not take effect till after the expiration of the ten days of advertising, and the other advertisement was inserted on the tenth day. It should not have been inserted until the eleventh day or later. Judge Wilson upheld this view of the law, and issued an injunction preventing the letting of the contract.

MEMBERS STATE BOARD OF ARBITRATION.

[Franklin Common Pleas, 1896.]

WHITE SEWING MACHINE CO. v. J. E. HAWES ET AL.

Members of the state board of arbitration cannot be sued in a civil action or in any county of the state while transacting official business.

PUGH, J.

Members of the state board of arbitration cannot be sued in a civil action or in any county of the state while transacting official business. This holding was made in the case of the White Sewing Machine Co. v. J. E. Hawes et al. J. E. Hawes is a woman, who formerly was an agent for the company at Xenia. Judge Little, of Xenia, was on the bond given by her when she became agent. The company claims that the woman owes it \$700. Judge Little is a member of the state board of arbitration. While he was in Columbus with the balance of the board during the strike of the employees of the Columbus, Hocking Valley and Toledo Railroad Co., in an effort to settle that trouble, the White Sewing Machine Co. brought a suit to hold him as the woman's bondsman. Judge Little moved that the service be set aside, putting himself on a plane with lawyers, witnesses and judges who are called away from home on legal business. Such persons cannot be caught in some other county and sued. Judge Pugh holds the motion to be good, which throws the case out of the courts, and the plaintiff will be remanded to the ordinary obligation of creditors to pursue their remedies against alleged debtors in the county where the debtor resides.

DIVORCE AND ALIMONY.

[Franklin Common Pleas, 1896.]

BROWN v. BROWN.

1. Bargainings between husband and wife about alimony are not unlawful, but the rule is that all agreements of that character should be laid before the judge. They are binding if he approves, but not binding if he dissents.
2. It is the duty of the court to scrutinize all such agreements and see that the wife is not over-reached or imposed upon by the husband. But if the wife chooses to adhere to the contract made with her husband the court cannot compel her to abandon it.

PUGH, J.

The court did not recognize the agreement as to alimony entered into between the parties, but made his own decree. He said: "Bargainings between husband and wife about alimony are not unlawful, but the practical rule and practices, and according to some authorities, the law is that all agreements of that character should be laid before the judge, and they are binding, if he approves, but not binding if he dissents to them. It is the court's duty to scrutinize all such agreements and see that the wife is not overreached or imposed upon by the husband. In this case the wife is not objecting to the agreement made with her

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husband, and the court cannot compel her to abandon the contract if she chooses to adhere to it. Still, that does not prevent or absolve the court from looking into it and pronouncing judgment upon the agreement. And if the defendant does not choose to abide by the contract she may have a decree fixing the permanent alimony at \$12,000. The first installment is to be paid June 1, 1896." The decree provides that Mr. Brown shall have custody of the child, but that Mrs. Brown may visit her son at times agreed upon. She is divested of all interest in her former husband's property.

LEGISLATURE—BRIBERY- INDICTMENT.

[Franklin Common Pleas, 1896.]

STATE OF OHIO V. W. C. GEAR.

1. The term "legislature" is synonymous with that of "general assembly."
2. The wording "pending," in an indictment for bribery in connection with a bill pending in the legislature, is sufficient to convey the proper meaning of the charge without stating whether the bill is pending in the senate or in the house.

PUGH, J.

Demurrer of ex-Senator Gear, to the indictment against him for bribery. Under the demurrer it was sought to set aside the indictment on the ground that it was defectively drawn. Two defects were alleged. One was that it charged Mr. Gear with bribery while a member of the legislature. It was urged that the proper name for the legislative branch of the state government is General Assembly. Another defect alleged was that the indictment charged bribery in connection with a bill then pending. The claim was made that the indictment should state exactly where the bill was pending—whether in the House or Senate, and whether in one of the committees of either of those bodies. The court held, first, that the term "legislature" is synonymous with that of "General Assembly" and that the statement "pending" is sufficient to convey the proper meaning of the charge.

CONDEMNATION.

[Hamilton Probate Court.]

C. P. & V. RY. CO. V. BLANK.

1. A railroad company, having obtained a verdict fixing the compensation for land to be taken, after waiting six months and failing to take advantage of such verdict, is not barred from suing again to condemn the same property.
2. In that event, however, the railroad company should make the property owner whole, as regards the expenses of the former trial, and place him in the same position he was in when the suit was first begun.

FERRIS, J.

The C. P. & V. R'y Co. obtained a verdict fixing the compensation for the land to be taken. The company did not take it at the valuation, but waited, and after six months had elapsed brought another suit to

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again condemn the same property. A demurrer was filed to the petition and the question was raised that the company had no right to sue the second time to condemn the property. Also that the company should be compelled to pay the defendant the expenses of the former trial, including attorneys' fees.

The court held that the fact that the company waited six months and did not take advantage of the verdict that had been rendered did not bar them from suing again, because if that were the case it would put such property forever beyond the reach of the company getting it if there should be necessity for its use for the public benefit. The court said that he believed the company should make the defendant whole and place him in the same position he was when the first suit was begun.

TOBACCO—AUCTION SALES—LICENSES.

[Hamilton Common Pleas 1896.]

CINCINNATI (CITY) V. WITHERS.

1. Tobacco is not "produce" within the meaning of the auction license law, and is not, therefore, exempt from the requirements of that law.
2. The method of selling tobacco "on the brakes" in Cincinnati does not come within a proper definition of the term "auction sales."
3. One who is in no more than an employee in conducting a sale is not subject to prosecution under the auction license law.

HOLLISTER, J.

The court reversed the decision of the police court of Cincinnati, in the matter of the conviction of one Withers, who was convicted of having violated the city ordinance in selling tobacco at auction without having taken out a license so to do. Although the judge was unable to adopt the contention of counsel for Withers that tobacco is "produce" and its sale, therefore, not subject to the requirements of the license law, but he held that the method of selling tobacco "on the brakes," in Cincinnati does not come within a proper definition of the term "auction sales;" and moreover, if such were not the case, that Withers, who in conducting the sale was no more than an employee, would not be subject to prosecution.

WILLS—PARTITION.

[Hamilton Common Pleas, 1896.]

IN RE REYNOLDS ESTATE.

A provision in a will that there shall be no division of the estate until ten years after testator's death is valid, and there can be no lawful partition until the expiration of the time named.

SAYLER, J.

Henry Reynolds sued his mother for a partition of the estate of his father. A provision in the will of the father was that there should be no division of the estate until ten years after his death; the attorney for the plaintiff contends that this provision was invalid. The court held that the will was valid, and that there could be no lawful partition until the expiration of the time named.

In re Appeal Surety.

FIXTURES.

[Hamilton Common Pleas, 1896.]

BAKER ET AL. V. CINCINNATI BRICK CO.

1. A horizontal boiler and an engine erected in a building for the purpose of supplying power to the machinery are fixtures.
2. An upright boiler standing on a brick foundation and used to spray oil on brick kilns is not a fixture.

SAYLER, J.

The court held that the horizontal boiler and engine which were erected in the building for the purpose of supplying power to the machinery were fixtures, while the upright boiler standing in a brick foundation and used to spray oil on the brick kilns was not a fixture.

CRIMINAL LAW.

[Cuyahoga Common Pleas Court, 1896.]

IN RE HABEAS CORPUS.

Where a fine is imposed and the prisoner is taken to prison, the sentence is then in execution and the police judge has no legal right to bring the prisoner back into court and impose a heavier fine on the same charge.

ONG, J.

In proceedings of *habeas corpus*, the court held that where a fine was imposed on the prisoner by the judge of the police court, and the prisoner was then taken to prison, that such sentence was then in execution, and that the police judge had no legal right to later bring the prisoner back from prison into court and impose a heavier fine on the same charge, as the police judge had ample opportunity at the time of imposing his first sentence to become conversant with the details of the case and fix his sentence accordingly, and that the subsequent fine could not be imposed on the prisoner, and the only fine that he was bound by would be that which was first imposed.

SURETIES.

[Hamilton Common Pleas Court, 1896.]

IN RE APPEAL SURETY.

A surety upon an appeal bond is a debtor and within the class of debtors covered by the statute relating to the conveyance of property in fraud of creditors.

SAYLER, J.

The court held that a surety upon an appeal bond is a debtor, and the mere fact that he may resist payment, and that upon suit being brought on the bond judgment may be rendered in his favor, does not take him out of the class of debtors covered by the statute relating to conveyance of property in fraud of creditors.

GOOD WILL.

[Court of Insolvency, Hamilton County.]

IN RE GOOD WILL OF BUSINESS.

1. The manner of conducting the business, the attention paid to it by the partners, the courteous way in which they treated their customers, the creating the knowledge in the trade that they kept the best class of goods, and bought those goods at such figures that they could sell them at the lowest rates, and in all such ways built up a trade and reputation in the business world, constitute the good will of a partnership business and may be so classed and valued by appraisers in the court of insolvency.
2. But the value of such good will must be a separate one. It must be an asset of itself separate from other portions of the business.

MCNIEL, J.

The court said, in instructing the appraisers appointed by the court of insolvency, that they had a right to take into consideration the good will. If they found that by reason of the manner of conducting the business, the attention paid to it by the partners, the courteous way in which they treated their customers, the creating the knowledge in the trade that they kept the best class of goods, and bought those goods at such figures that they could sell them at the lowest rates, and in all such ways built up a trade and a reputation in the business world, then the appraisers could class that as good will, and place a value on it. But that the value must be a separate one, and the good will must be an asset of itself separate from the other portions of the business.

CRIMINAL LAW.

[Hamilton Common Pleas Court, 1896.]

STATE OF OHIO v. DOE.

A prisoner cannot legally be tried, convicted or sentenced for any crime other than the one for which he was arrested.

PER CURIAM.

In this case defendant was arrested on the charge of drunkenness and taken to jail, and when he was arraigned for trial he was not tried on the charge of drunkenness, but was convicted and sentenced to the work house for three years under the habitual criminal act. In that case, on *habeas corpus* proceedings being brought, the court held that the prisoner could not be sentenced for any crime other than the one for which he was arrested, and that, therefore, the sentence was illegal, and the prisoner was ordered released.

INFORMATION.

[Hamilton Common Pleas Court, 1896.]

IN RE TRICK GAME.

An information for practicing a trick game in obtaining money, which fails to specify the kind of a trick game practiced, is defective.

HOLLISTER, J.

The judgment of the Cincinnati police court in the case of one Hamilton, who was convicted of practicing a trick game in obtaining

In re Pavement.

money from certain attorneys in payment for reading notices of themselves in a certain newspaper, which never appeared, is reversed. The court bases his reversal on the ground that the information failed to specify the kind of a trick game which was practiced.

PUBLIC OFFICERS.

[Hamilton Common Pleas Court, 1896.]

***MOORE V. CASSILY, ADMR.**

1. While it is competent for a public officer to employ a deputy to assist him in the performance of the duties of his office, it is contrary to public policy for such officer to turn over his whole office to another; and a contract embodying such agreement is void.
2. And in case at bar, inasmuch as the inspector of boilers and the inspector of hulls constitute a board for the examination of steamboat engineers, the action of the latter in turning his office over to the former placed all the authority of the board in one individual, and the agreement is void for that reason.

WILSON, J.

Plaintiff alleged that he served as U. S. inspector of steamboats on steamboats and that during the same period the deceased held the office of U. S. inspector of hulls; that deceased became infirm and turned his office over to plaintiff, who performed all the duties pertaining thereto under an agreement whereby the deceased was to pay plaintiff the amount of the salary pertaining to the office; that plaintiff performed all the duties of the office for a long period and until the deceased died, and for the services he had not been paid. The prayer was for the amount of salary thus earned. The court held that while it is competent for a public officer to employ a deputy to assist him in the performance of the duties of his office, it is contrary to public policy for a public officer to turn over his whole office to another who is to perform all its duties, and a contract embodying such an agreement is void. And especially was it true in the case at bar, for the reason that the U. S. inspectors of boilers and of hulls constitute a board for the examination of steamboat engineers and others, and the turning by the deceased of his office over to plaintiff, placed all the duties and authority of this board in one individual.

STREETS—SEWERS.

[Franklin Common Pleas Court, 1896.]

IN RE PAVEMENT.

1. A property owner has no rights in a street or the space under a pavement which are not subject to a city's prior right.
2. A property owner's remedy, where a city constructs a sewer under the sidewalk, is by suit for damages, not by injunction to prevent construction of the sewer.

BADGER, J.

The court refused to continue an injunction obtained by a certain property owner against the city to prevent the latter from constructing

* Affirmed in part by circuit court, 9 Circ. Dec., 305.

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a sewer under the sidewalk in front of his property on a certain street. The court held that the city was entitled to the prior use of the streets for such improvements as may be necessary for the public good, and that the property owner had no rights in the street or a space under the pavement which were not subject to the city's prior right, and, further, that the property owner's remedy was in the nature of a suit for damages.

CHATTEL MORTGAGES—CREDITORS.

[Hamilton Common Pleas Court, 1896.]

RETZSCH V. RETZSCH PRINTING CO.

1. A chattel mortgage withheld from record and filed just before application is made for a receiver, is constructively in fraud of creditors and void as to them.
2. A vendor and mortgagee, having permitted vendee and mortgagor to exchange the article mortgaged for another upon which no mortgage is taken, is a general creditor only and not entitled to preference.

HOLLISTER, J.

This is a case involving the priority of liens, in which a chattel mortgage was given to one Guy, who withheld it from record for some weeks, filing it just before application was made for a receiver for the mortgagor company. The Sheridan company also held a chattel mortgage on a paper cutter, which they permitted the company to exchange for another cutter upon which no mortgage was taken.

It was held that an order might be taken in accordance with the following conclusions: 1. The Guy mortgage is constructively in fraud of creditors and void as to them. 2. The Sheridan company is not entitled to a preference; they are general creditors of the Retzsch company for the contract price of the machine.

MITTIMUS.

[Cuyahoga Common Pleas Court, 1896.]

IN RE WORKHOUSE.

A mittimus is not necessary to hold a prisoner committed to the workhouse when the officer bringing him has a transcript.

DISSETTE, J.

In *habeas corpus* proceedings the question was raised that the prisoner, who was brought from Akron to Cleveland to serve time in the workhouse, could not be held, as the officer bringing him did not have a mittimus, and that the workhouse authorities could not therefore hold him. The court declared a mittimus unnecessary when the officer bringing the prisoner had a transcript.

WILLS EXECUTED ABROAD.

[Hamilton Probate Court, 1895.]

IN RE EST. OF CARL FABER.

1. A will executed by a citizen of this state, while temporarily residing abroad, although executed in accordance with the laws of a foreign country, is a domestic will and can be probated and the estate administered here.
2. Where, in case of a will executed abroad, it is impossible to present the original will for probate, as, for instance, a will executed in Germany and written in the book of wills, a properly authenticated copy will be admitted in its place.

FERRIS, J.

One Carl Faber, of Cincinnati, while visiting in Germany, made a will bequeathing his entire estate, which is worth about \$12,000, to his brothers and sisters, and disinheriting his son, C. L. Faber, who is his only heir-in-law.

In accordance with the custom in Germany, the will was written in a book of wills instead of on a loose sheet of paper, as is the custom in Ohio. It is impossible, therefore, to bring the original here.

The disinherited son resisted the admission of a copy of the will to probate.

The proof showed that the will was executed in conformity with the laws of Ohio as well as those of Germany.

The court held that a will executed by a citizen of this state, while temporarily residing abroad, is a domestic will, and can be probated here and the estate administered here, while a foreign will could, of course, only be admitted to record.

The court also gave it as his opinion that in such a case as this, where it is impossible to present the original will for probate, a properly authenticated copy will be admitted in its place.

SALE OF CONVICT MADE GOODS.

[Cuyahoga Common Pleas Court, 1895]

STATE OF OHIO V. FRANK P. YANDERS.

The act of May 19, 1894, 91 O. L., 346, making it unlawful to sell convict-made goods, manufactured in the prisons of other states, without first obtaining a license from the secretary of state, is unconstitutional in that it discriminates between goods manufactured in this state and those manufactured outside the state. It is, for that reason, in conflict with the constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several states.

NOBLE, J.

The law passed by the Ohio General Assembly, May 19, 1894, 91 O. L., 346, making it unlawful to sell convict-made goods, manufactured in other states, without first obtaining a license from the secretary of state of Ohio, went into effect January 1, 1895. Under this law, Frank P. Yanders was arrested on a warrant issued by Justice of the Peace Geo. R. McKay, charging him with selling brushes made in a New York penitentiary.

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The law is unconstitutional in that it discriminates between goods manufactured in this state and those manufactured outside the state. The clause which it is claimed was violated is a section of the constitution of the United States which provides that Congress should have power to regulate commerce with foreign nations and among the several states.

The doctrine is well settled that power is vested in Congress alone to regulate commerce among the states, and that the non-exercise of its power is saying that commerce shall be unrestricted and that it is not unrestricted when discriminating burdens are placed upon goods of foreign manufacture. A state has not the authority to impose a burden upon foreign manufactured goods, which is not imposed on goods manufactured within the state, even though it might be justified under the claim of police power.

No state could levy or tax on interstate commerce in any form either by way of duties levied on transportation or on the receipts derived from transportation or on the occupation or business of carrying it on.

INSURANCE, FIRE.

[Cuyahoga Common Pleas Court, 1895.]

HONNORA HILLIARD V. CALEDONIA INS. CO.

1. Where an insurance company issues a policy upon the recommendation of an agent, the act carries with it the proof that the latter was authorized to make contracts for the company.
2. The knowledge of the agent of an insurance company, that the applicant for insurance had only a dower interest in the property to be insured, worth less than one-fourth the amount for which such agent offered to and did insure the property, is the knowledge of the company, and, in the absence of fraud on the part of the assured, the company is bound by the knowledge of such agent.

LAMSON, J.

This is a pioneer case under the Howland law, which relates to the liability of insurance corporations upon contracts entered into by their agents. The case is that of Honnora Hilliard v. Caledonia Insurance Co., of Scotland, to recover \$800, the amount of an insurance policy held by her on property in which she held only a dower interest, and which was destroyed by fire. Mrs. Hilliard's interest in the property was worth not more than \$150 or \$200, but an agent of the company agreed to insure her interest for \$800. There was a clause in the property stipulating that unless the insuree was the sole owner of the property, the policy would be void. Plaintiff claimed that the agent was in full possession of the facts concerning her interest in the property, and with that knowledge he assumed the risk for the company he represented. He argued that the knowledge of the agent was the knowledge of the company and the court so decided. The insurance company stated that the agent who accepted the risk was not authorized to act as agent in the capacity of assuming risks, but the court decided that, as the company had issued the policy upon the recommendation of the agent, the act carried with it the proof that the latter was authorized to make such contracts. The court also held that it not being claimed by the company

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that any fraudulent representations were made by Mrs. Hilliard as to the ownership of the property, the company was bound by the knowledge of the agent. The jury rendered a judgment of \$834 in favor of Mrs. Hilliard.

— — Dawley, for plaintiff.

A. T. Brewer, for defendant.

COUNTY COMMISSIONERS—RURAL STREETS.

[Franklin Common Pleas, 1896.]

FLORENCE D. SULLIVAN V. CHAS. M. WILLIAMS ET AL.

The statute authorizing county commissioners to improve rural streets is unconstitutional.

PUGH, J.

Several years ago Mr. Sullivan sold a tract of land just north of the Villa to C. M. Williams, taking a mortgage for the greater part of the purchase money. Williams laid the tract out in lots and dedicated the streets to the public. Williams then improved a street running through the land, and bonds were issued for the improvement by the county commissioners. Williams defaulted on his interest and Mr. Sullivan brought suit to foreclose his mortgage, which covered the whole tract, street and all. Sullivan claimed that the land was covered by his mortgage. The court held that the statute under which the street was improved was unconstitutional and invalidating the assessment upon the property.

ASSESSMENTS.

[Franklin Common Pleas Court, 1896.]

IN RE CORNER LOT ASSESSMENT.

The law as it now stands gives a city council authority to exercise its judgment as to what assessments shall be made against a corner lot.

PUGH, J.

The amendment to the Taylor law by Mr. Breck is a good defense for the city of Columbus to make in a corner lot suit. The improvement is made under the law as it now stands, which gives the city council authority to exercise its judgment as to what assessments shall be made against a corner lot.

SCHOOL PROPERTY.

[Hamilton Common Pleas Court, 1896.]

IN RE SCHOOL PROPERTY.

The law requiring boards of education to pay assessments for street improvements out of their own funds is unconstitutional.

MOORE, J.

The court held that school property could not be assessed for street or sewer improvements, and that the recent law requiring the board of education to pay assessments for street improvements out of its own funds was unconstitutional.

PARTNERSHIPS—REGISTRATION.

[Hamilton Common Pleas Court, 1896.]

IN RE PARTNERSHIPS.

The law relative to the registration of partnerships does not apply to actions for damages, not arising from a contract between the parties.

WILSON, J.

In the matter of the law which requires partnerships to register the names of the partners in the county clerk's office and publish them for six weeks before they can maintain a suit in court. The question was raised whether the partnership could maintain the action when they had not registered as required by law. The court held that, as this action was one for damages, and not one arising from a contract between the parties, the law as to registration did not apply. The decision was based on the holding in the 61 Cal., 165.

SCHOOLS.

[Muskingum Common Pleas Court, 1895.]

IN RE BOARD OF EDUCATION AT ZANESVILLE.

Boards of education are bound under our laws to provide accommodations for all pupils legally entitled to attend school and who desire to do so.

MUNSON, J.

Boards of education are bound, under our laws, to provide accommodations for all pupils legally entitled to attend a school, who desire to do so. The suit was brought under the law which permits children who are a mile and a half from the school-house in their own district to attend the nearest school. The children who were kept out of school are colored, and the directors claimed the school buildings could not accommodate any more pupils.

SALOON OR ROADHOUSE—INJUNCTION.

[Hamilton Common Pleas Court, 1895.]

PAGE V. MYERS.

The keeper of a saloon or roadhouse is not an innkeeper in the sense which would make him responsible for a horse and buggy hitched in front of his place by a customer.

SAYLER, J.

The keeper of a saloon or road house is not an inn-keeper in the sense which would make him responsible for the safety of a horse and buggy which had been hitched in front of his place by one of his customers.

PUBLIC CONTRACTS.

[Hamilton Common Pleas Court.]

IN RE STREET LIGHTING.

Contracts for lighting streets and public places in Cincinnati are void unless the city auditor certifies that the necessary funds are in the treasury to the credit of the fund for that purpose.

WILSON, J.

A contract for lighting the streets and public places in Cincinnati comes within the provisions of the Burns and Worthington laws, and such contracts are void unless the city auditor before or at the time of making the contract certifies that the money required to carry out the contract is in the city treasury to the credit of the fund for that purpose.

LIBEL.

[Franklin Common Pleas Court.]

JNO. H. COLEMAN V. OHIO STATE JOURNAL.

Where testimony of witnesses or statements of interested parties in a criminal prosecution are published in good faith by a newspaper, as a matter of news, no action will lie in libel, even though such statements prove unfounded in fact.

BADGER, J.

Coleman sued for \$40,000 damages claimed on account of alleged injury to his reputation from a publication of testimony in the Jimison case. The court held that where the testimony of witnesses or statements of interested parties in a criminal prosecution are published in good faith by a newspaper as matter of news, no action will lie in libel, even though such statements prove unfounded in fact.

MANDAMUS—ERRORS—COUNTY.

[Franklin Common Pleas Court, 1895.]

STATE EX REL. V. COMMISSIONERS, FRANKLIN CO.

1. The proper proceeding, upon refusal of county commissioners to allow a fee for assisting in a criminal prosecution, is to take the case up on error. Mandamus will not lie.
2. Bills fixed by judges as fees for lawyers in criminal cases are not reviewable by the county commissioners.

BADGER, J.

Demurrer of the county commissioners to the mandamus suit brought by General Reeves of Lancaster to compel the payment of his \$800 fee for assisting in the prosecution of P. J. Elliott sustained. It was held that the proper proceeding was to take the case up on error, rather than by mandamus. Judge Badger was of the opinion that bills fixed by judges as fees for lawyers in criminal cases were not reviewable by county commissioners.

COMMON CARRIER.

[Hancock Common Pleas Court.]

A. J. MORTON V. LAKE ERIE AND WESTERN RY.

A railroad company has no right to confiscate a mileage ticket, purchased by a ticket broker in a fictitious name, and upon which another person is travelling, without offering to refund the money.

DWIGGINS, J.

Arthur J. Morton, a ticket broker, bought a 1,000-mile ticket of the Lake Erie and Western in a fictitious name. When 286 miles had been used up the conductor confiscated the ticket because the person riding upon it was not the one in whose name it was issued. Mr. Morton brought suit against the railway company for \$14.28, the value of the unused portion of the ticket. He was given a judgment for the full amount, the court holding that the company had no legal right to take up the ticket without offering to refund the money.

SLANDER.

[Hamilton Common Pleas Court, 1895.]

CHAS. P. GRAY V. ELLA WOOD.

To charge a man with calling upon unmarried women as an unmarried man, when he is married, conveys the idea that he calls on the pretense that he is an unmarried man. It amounts to charging an indictable offense and an action for slander lies.

WRIGHT, J.

Mrs. Ella Wood, at Cincinnati, is charged with having published of Dr. Chas. P. Gray that he "frequently called upon unmarried women as an unmarried man, and he is a married man." The defendant claimed by her demurrer that the words did not charge a crime upon Dr. Gray, and that they were, therefore, not actionable unless there was an averment of special damage suffered.

The court said that words are to be given the meaning that men of ordinary intelligence would give them. To publish the words charged in the petition of a man is in effect to charge him with a violation of the law. O. L., 131, page 90. To charge a man with calling upon unmarried women as an unmarried man conveys the idea that he calls on the pretense that he is an unmarried man, and ought to be held to have such meaning. The offense under the law is only a misdemeanor, and the punishment is not infamous, yet the charge is one involving moral turpitude of a degree such that it elevates the charge in heinousness to the serious nature of a charge infamous by reason of the punishment attached.

We have, therefore, a case of: First, charging an indictable offense against the plaintiff, and, second, an offense involving moral turpitude. The action for slander lies, and the demurrer is overruled.

BUILDING AND LOAN ASSOCIATIONS.

[Hamilton Common Pleas Court, 1895.]

ATLANTIC BUILDING ASSOCIATION CO. V. VOGELER.

1. Borrowing members of a building and loan association are entitled to dividends on the amount paid in each year and a rebate of interest on the amount paid in from the beginning at the end of each year, but are not entitled to dividends on the total amount paid in as dues from the beginning.
2. The company having been organized before the law of 1880 was passed, and defendant's assignor having been a member under this system from the beginning, and defendant having taken the benefit of this plan for several years before objecting, he is estopped from having accounts of the company recast upon another basis.

WRIGHT, J.

The suit was that of the Atlantic Building Association Company against Frederick Vogeler, to foreclose a mortgage. Defendant claimed that the entire sum borrowed had been repaid, because he was entitled to a greater sum as dividends than he had been credited with. The defendant bought the property of Henry Wrede, the original owner of the shares, and became the owner of the shares of stock in the plaintiff, belonging to Wrede, as well as of the property given to secure the repayment of the money. He claimed he was entitled to dividends on the total amount of money paid in as dues from the beginning, and not merely on the amount paid in each year, as was allowed by the plaintiff. The method of plaintiff was to allow the dividend to borrowing members on the amount paid in each year, and a rebate of interest on the amount paid in from the beginning at the end of each year. This virtually gave the member a dividend as to the rebate, beside the cash dividend paid each year.

Held, that plaintiff's claim as to the correct method of allowing dividends in this case was proper. The company having been organized before the law of 1880 was passed, and his assignor having been a member under this system from the beginning, and the defendant, Vogeler, having taken the benefit of this plan until the year 1888, before objecting, is now estopped from insisting upon having the accounts of the company recast upon another basis.

INDICTMENT—LIMITATION.

[Hamilton County Common Pleas Court.]

STATE OF OHIO V. F. X. BARRETT.

Where more than three terms have intervened since the return of an indictment, without bringing case to trial, accused is entitled to discharge, without regard to what disposition the prosecuting attorney may have made of the case.

WILSON, J.

On a motion to dismiss certain indictments pending in that court against one F. X. Barrett. Where more than three terms have intervened since the return of an indictment, without bringing the case to trial, the defendant is entitled to a discharge, without regard to what disposition the prosecuting attorney may have made with reference to the case.

RAILWAY RELIEF ASSOCIATIONS.

[Franklin Common Pleas Court, 1895.]

L. B. FARROW v. P. C. C. & St. L. R. R. Co.

1. One who accepts benefits from a railway relief association is barred from collecting damages. He has his option to accept benefits or sue the company, but cannot do both.
2. Railway relief association contracts are not against public policy.
3. The act of 1890, so far as it undertakes to prohibit voluntary contracts, such as those referred to, is unconstitutional.

DUNCAN, J.

Farrow sued for \$20,000, the company demurring on the ground that by his contract of membership in the relief association he had his option either to accept the benefit from the association or sue the company, but that he could not legally do both. As Farrow accepted the benefits it was claimed that he was barred from collecting damages. This view was sustained by the court, who held that the relief association contract was not against public policy. Decisions of the Supreme Courts of Pennsylvania, Indiana and Maryland, and of Judge Sage of the United States circuit court, were cited in support of the decision. Judge Duncan held that the statute of 1890, so far as it undertook to prohibit voluntary contracts, such as that between Farrow and the association, was unconstitutional.

LIBEL INJUNCTIONS.

[Franklin Common Pleas Court, 1895.]

COLUMBUS GROCERY CO. v. WHOLESALE GROCERS' ASSOCIATION.

An injunction cannot be granted to restrain a threatened libel. The proper remedy is to wait until the libel occurs and bring suit for damages.

EVANS, J.

Some time ago the Columbus Grocery Company, in the Franklin county common pleas, secured a temporary order restraining the Wholesale Grocers' Association of Ohio from circulating stories about the plaintiff, which were libels on their method of doing business. A motion was filed to dissolve the restraining order, and recently Judge Evans passed on it. He dissolved the restraining order on the ground that there could be no injunction granted to restrain a threatened libel. He laid down the principle that the courts could not anticipate such conduct. The proper remedy for plaintiff was to wait until the libel occurred and then bring a suit for damages.

WIDOW'S ALLOWANCE.

[Lucas Probate Court.]

EST. OF EZRA HOWLAND, DECEASED.

In fixing a widow's one year's allowance after the expiration of twenty years the circumstances of the parties at the time of the husband's death should govern the amount.

MILLARD, J.

Mrs. Howland never received the customary allowance for her one year's support, and quite recently made an application for it. There

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was some difference of opinion as to the facts which should be considered in making the allowance, but the court held that inasmuch as Mrs. Howland was entitled to the allowance for the year of her husband's death, the expense of living and the circumstances of the parties at that time should be considered in fixing the amount which she should receive, even though payment had been delayed so many years. An allowance of \$600 was made.

PARDONS.

[Cuyahoga Common Pleas Court, July, 1895.]

IN RE HENRY C. BIEGLE, HABEAS CORPUS.

A pardon once granted cannot be revoked. Therefore, the fact that one of the signatures to the application was given under a false impression does not warrant a workhouse board in refusing to liberate a prisoner thus pardoned.

NOBLE, J.

This ruling was in connection with the sentence of Henry C. Biegle to the workhouse. Biegle was fined and given a workhouse sentence in the police court for following and annoying Mrs. Frank Many. He appealed from the court's decision to the common pleas court, and Judge Dellenbaugh sent the case back to the police court for another trial. Biegle's attorney then secured the signatures of Judge Fielder and Director of Charities Warden, comprising the majority of the board of pardons, to a pardon for his client. Judge Fielder learned afterward that he had attached his signature to the document under a false impression, and requested Mayor McKisson, as chairman of the board, to telephone to Superintendent Dorn not to release Biegle. This the mayor did, and when Biegle's attorney presented the pardon to Superintendent Dorn, the latter refused to liberate the prisoner. Biegle's attorney then obtained a writ of *habeas corpus*, and Superintendent Dorn produced Biegle in the common pleas court. When the evidence on both sides was given, Judge Noble decided that Biegle should be liberated. He said that a pardon once granted could not be revoked.

CONSTRUCTIVE NOTICE.

[Franklin Common Pleas Court.]

RAILROAD EMPLOYEES BLDG. AND LOAN ASSN. V. DAWSON ET AL.

The general rule that open, notorious and visible possession is constructive notice to all who may take mortgages on land cannot be applied against a purchaser or mortgagee from a vendee whose vendor remains in possession.

PUGH, J.

In September, 1891, A. H. Perry conveyed to William R. Dawson, lot 4 of Dennison Place, addition No. 2. After conveyance Dawson and wife borrowed \$4,000 of the Railroad Employees Building and Loan Association and gave a mortgage on the lot to secure the loan. Suit was brought to foreclose the mortgage. When Oril Friesner learned this she put in an answer and cross-petition that she had in July, 1893,

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purchased lot 5 adjoining and three feet off lot 4. The facts showed that Perry did not sell all of lot 4 to Dawson, having reserved three feet, but through a mistake of the scrivener the deed given Dawson did not show this. On the same day Perry made his deed, Dawson and wife deeded Mrs. Friesner the three feet of ground which was conveyed her by Perry, at his request. The question was whether the mortgage covered the three feet. The court held that though the general rule was that open, notorious and visible possession was constructive notice to all who might take mortgages on land, yet this rule could not be applied against a purchaser or mortgagee from a vendee whose vendor remained in possession. This exempts the three feet.

DEVISE.

[Lucas Common Pleas, 1894.]

IN RE A WILL.

A will which devises property to the wife to do with as she pleases, what remains at death to go to testator's niece, conveys the property absolutely to the widow.

HARMON, J.

This case involves the construction of a will of four lines, as follows:

"I give and bequeath to my beloved wife, ———, all my property, both real and personal, to do with as she pleases. And at her death, what should remain, it is my will, should go to my beloved niece,——."

The action was brought by the niece against the executor and trustee of the estate of the wife, it being an action in trespass relating to the real estate devised by the will.

Another case, considered at the same time, was brought by the administrator *de bonis non* with the will annexed of the estate of the devisor in the above will, against the executor, in relation to the personal property devised by the will.

The question in each case was, whether the above will conveyed to the widow a fee-simple estate, or a life estate only. The defendant demurred to the petition, on the ground that no cause of action was set up. At the close of a two days' argument, the court decided that the will conveyed the property absolutely and in fee-simple to the widow, and that there was no remainder over to the niece; and, consequently, that the demurrer of the executor and trustee was well taken, and should be sustained.

WILLS.

[Hamilton Probate Court, 1898.]

IN RE WILL OF MRS. OSKAMP.

1. The jurisdiction of the probate court is limited to the inquiry as to whether the forms of law have been complied with in the execution of a will, and the condition of mind and capacity of testator to make a disposition of his property, as revealed by testimony of the witnesses to the will.

In re Will of Mrs. Oskamp.

2. The probate court has no jurisdiction to take notice, in opposition to a will, of the process of evolution appearing in the will and its various codicils, whereby executors were reduced from three to one, and the character of the trust made more favorable to the one remaining executor, as indicating undue influence upon testator. Such evidence can only be entertained by a court of equity.
3. A will having been admitted to probate letters must necessarily issue to the executor named therein. The remedy in case of his unfitness is by motion to remove.

FERRIS, J.

In re will of the late Mrs. Oskamp, widow of Clemens Oskamp. It was contended by the opponents of the will that the court should take notice of the process of evolution appearing in the will and its various codicils, whereby the executors were reduced from three to one, and the character of the trust created was made more favorable to the one remaining executor, and that from this process of evolution the court could and should find that undue influence had been exerted upon testatrix. The court, however, was firm in the opinion that evidence derived from such a deduction could only be entertained by a court of equity, and that the jurisdiction of the probate court was limited to the inquiry as to whether the forms of law had been complied with in the execution of the will, and the condition of mind and the capacity of the testatrix to make a disposition of her property as revealed by the testimony of the witnesses to the will.

An effort was also made to prevent issuing letters to the executor named in the will, on the ground that he was not a proper person to administer the estate. This the court refused to hear, holding that having admitted the will letters must necessarily issue to the executor named therein and the remedy in case of his unfitness was by motion to remove.

ASSIGNMENTS FOR CREDITORS.

[Hamilton Court of Insolvency, 1897.]

IN RE ASSIGNMENT H. K. ROBERG & Co.

Inasmuch as under the Ohio law a valid assignment by a firm for the benefit of creditors cannot be made except by or with the assent of all members, the court of insolvency can only obtain jurisdiction by the filing of a deed in which all the parties have joined.

MCNEILL, J.

The court overruled the motion to dismiss the motion to set aside the assignment of H. K. Roberg & Company, and proceeded with the hearing of testimony as to whether all the members of the firm joined in the deed of assignment or consented to or ratified its execution. The holding was that inasmuch as under the law of Ohio a valid assignment by a firm for the benefit of creditors can not be made except by or with the assent of all the members of the firm, the court of insolvency can only obtain jurisdiction by the filing of a deed in which all the parties have joined. If all have not joined, no valid deed has been filed, and no decree is necessary to set it aside. The case at bar was distinguished from that of the Consumers' Ice Co. in that in the latter case the deed of assignment was executed in due form by the board of directors, the

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authorized body to perform such an act, and the attack was based on matters preceding the execution of the deed, and not upon the power of the board to execute a valid deed; but in the case at bar the deed itself is attacked for invalidity. The court based his holding upon *Holland v. Drake*, 29 O. S., 441, where one member of a firm executed a deed of assignment which was filed previous to the levying of an attachment by a creditor, but subsequent to the attachment the remaining partner came into court and signed the deed. The question of the priority of the attachment then came up on distribution, and the Supreme Court held that there was no valid deed of assignment until the second partner had joined in its execution, and the attachment was therefore good.

JUDICIAL SALES.

[Hamilton Court of Insolvency, 1898.]

IN RE ASSIGNMENT OF SPECKER & BROS.

1. A bid at a judicial sale, of less than two-thirds of the appraised value of the property, is not, however small the deficiency, one-third of a cent in case at bar, a bid which the court is bound to accept.
2. The fact that there is no coin of the country small enough to represent the deficiency is not a sufficient reason why it should not be noticed or the sale set aside.
3. Where there were two parcels of property, the bid on one which was one-third of a cent more than two-thirds of the appraised value, cannot be offset against the deficiency in the amount offered for the second parcel.

M'NEILL, J.

Question whether a bid for property offered at judicial sales must be accepted notwithstanding it lacks a fraction of a cent of being two-thirds of the appraised value, decided in the negative. The bid in question was by L. B. Harrison for property assigned by Specker & Bros. By a miscalculation the bid was made at one-third of a cent less than the required two-thirds of the appraisement. It had been ordered accepted by the court upon affidavits that a better price could probably not be secured. But a subsequent bid of \$1,000 more deprived the affidavits of their previous force, and the question arose whether the Harrison bid was a legal bid. If it was sufficient, the policy of good faith toward purchasers which is maintained by the court would not permit of reopening the sale for the reason that a better bid had been subsequently received. But, if the deficiency of one-third of a cent rendered the Harrison bid invalid, the sale would have to be reopened for correction, and once opened the later and higher bid would have to be considered. It was contended on behalf of Mr. Harrison that inasmuch as there is no coin of the realm small enough to represent the deficiency in the first bid, it was not a deficiency of which notice could be taken. But following the analogy which would give a magistrate exclusive jurisdiction in a suit for \$99.99½, it is held that a bid of less than two-thirds the appraisement was not, however small the deficiency, a bid which the court was bound to accept.

There were two parcels upon which Mr. Harrison bid. For one of them his offer was one-third of a cent more than two-thirds of the appraisement, but this excess, of course, could not be offset against the deficiency in the amount offered for the second parcel.

CORONER'S INQUESTS.

[Franklin Common Pleas, 1898.]

BIRMINGHAM V. FRANKLIN CO. COM'RS.

1. Finding a dead body plainly means that it cannot have been before known or discovered; and such finding cannot be predicated of the body of a person who was killed in the presence of a number of witnesses, persons who had no act or part in the killing.
2. The coroner has no power to hold an inquest except in cases where the cause of death is unknown.

PUGH, J.

A test case brought for the purpose of having a judicial construction placed upon the statutes governing fees for services rendered by the coroner. Some time previous, Albert Claprod was killed in a street brawl in the presence of several witnesses. Judge Pugh held that the statutes do not authorize an inquest in cases of this kind.

The section of the statute construed reads:

"When any information is given to any coroner that the body of a person whose death is supposed to have been caused by violence has been found within his county, it is his duty to hold an inquest over such body."

The first condition of the coroner's power and right to hold the inquest is that a person is dead; the second is, that his death is supposed to have been caused by violence, and the third is that the dead person's body was then in the coroner's county. It is necessary to determine who is to do the mental act of supposing that the death was caused by violence. My notion, however, is that it may be done by any person or persons who impart the information to the coroner or by the coroner himself. The last requisite is the most important one. Before the coroner can act he must be informed that a body has been found in his county. The term "found" imparts *ex vi termini* that the body was discovered; that is, that it was found for the first time, ascertained and recognized. It means also that the cause of death is not known. When the cause of death is well known; when a homicide by violence occurs in the presence of others who take no part in it; when a murder takes place in plain sight and hearing of witnesses, the body of the homicide cannot afterwards be found in the sense of the statute.

Finding a dead body plainly means that it cannot have been before known or discovered, but such a finding could not be predicated of the body of a person who was killed in the presence of a number of witnesses—of persons who had no act or part in the killing.

Some such process of reasoning must have conducted the Supreme Court to the resolution of law which it reached in the case of Muzzy v. Comrs., decided 1831, and reported in 1 Dec. Re., 135. But no matter what was the reasoning, there was a decision made in that case which I am obliged to follow. The fact that it was decided at Cincinnati does not detract from its controlling authority. If it is to be reversed, that should be done by the Supreme Court and not by this lower court. The statute which the court then and there construed was couched in the precise language of the present statute and precisely the same question was involved in that as is involved in this case.

The decision was that a coroner has no power to hold an inquest except in cases where the cause of death is unknown. That is the law of this state right now, and it was the law when the inquest was held over the body of Claprood.

JURISDICTION.

[Clinton Common Pleas, 1898.]

STATE EX REL. PALMER V. SOUTH, SHERIFF.

1. The probate court has no jurisdiction to entertain an inquiry as to the mental condition of a person, alleged to be insane, who is under indictment in the court of common pleas.
2. The statute provides, in such cases, that the prisoner's sanity may be determined by a trial in the court of common pleas, prior and independent to his trial under the indictment. The common pleas, therefore, has exclusive jurisdiction in such cases.

VAN PELT, J.

Mandamus proceedings instituted by Mrs. Paul Palmer against Sheriff South, in which she sought to compel the sheriff to execute an order of the probate court to convey her husband to the Athens State Hospital. It appears that her husband was recently indicted for forgery and his trial was set for hearing, but before trial was commenced the wife filed an affidavit before Judge J. S. Kimbrough of the probate court in which she alleged that her husband was insane. The probate court issued an order to the sheriff commanding him to produce Palmer in court for trial. The sheriff refused, but was compelled by that court on another order to comply. Palmer was adjudged insane by the probate court. The sheriff was commanded to convey Palmer to the Athens State Hospital, but refused on the ground that he was answerable to the common pleas court for the body of Palmer to answer to the charge of forgery. Mrs. Palmer then instituted the mandamus proceedings to compel the sheriff to comply. The case was heard recently. It was an entirely new question, there being no reported cases like it in any of the authorities. The statutes provide that where a person is alleged to be insane and under indictment for criminal charge he can have his sanity investigated by a jury in the common pleas court. But in this case it was sought to proceed in the usual way of lunacy inquest in the probate court, Judge Kimbrough holding that he had authority to act in the case as in ordinary lunacy cases. In deciding the mandamus proceeding, after an exhaustive investigation of the question, it is held that the probate court had no jurisdiction in the case and the order of said court is overruled. Palmer's sanity could only be tried by a jury in the common pleas court.

INSANITY.

[Stark Common Pleas, 1898.]

STATE OF OHIO V. DOMINIC TYLER.

1. Trial to determine the sanity of a person under indictment in the court. If the testimony shows that accused is probably not sane, he is entitled to a verdict finding that he is not sane.
2. A man may be insane according to medical science and yet responsible for his acts in law.

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3. A weakness of mind which falls short of that nature and degree of mental freedom which render a person incapable of distinguishing between right and wrong, would be insufficient to justify a verdict of insanity.

McCARTY, J.

Gentlemen of the Jury: The question that is presented for your determination in this lawsuit and inquire, is, whether the accused, Dominic Tyler, is or is not sane, and that is the sole question you are called upon to determine.

Section 7240, Rev. Stat., relating to this subject, provides two things; one is that, "When the attorney of a person indicted for an offense suggests to the court in which the indictment is pending at any time before sentence, that such person is not then sane, and a certificate of a respectable physician to the same effect is presented to the court, the court shall order a jury to be impaneled, to try whether or not the accused is sane at the time of such impaneling" * * * The statute also provides that "The jury shall be sworn to try the question whether the accused is or is not sane, and a true verdict give according to the law and the evidence: and on the trial the accused shall hold the affirmative; if three-fourths of the jurors agree upon a verdict, their finding may be returned as the verdict of the jury." * * * That is to say, if nine of your number agree upon a verdict, either that the accused, Dominic Tyler, is sane, or that he is insane at the time this trial began, such concurrence of nine of your number shall be returned as your verdict.

The term "sane" used in the language of the statute under which this proceeding is being held, is in its meaning the opposite or contradiction of the term "insane;" the latter is equivalent to the words "not sane." That is, "insane" is equivalent to the words "not sane." Both of these words or expressions have an established legal meaning in the state of Ohio; and used in criminal cases, the term "insane" signifies that when the accused has not sufficient knowledge, reason, power and mental capacity to understand that his act, which is charged to be criminal in its character, was intrinsically wrong, he is not responsible. A sane person, therefore, is one who has sufficient knowledge, power and judgment to distinguish right from wrong, and having such mental power has sufficient will power to refrain from doing the wrong when the alternative is presented to him. That is, when he may choose to do either right or wrong, has the mental power to make the choice.

This is the interpretation which must be given to the words "sane" or "not sane" used in the statute under which this inquiry is being held. This is the meaning which these words or their equivalents will bear to you whenever used in what I shall say to you in these instructions.

The defendant claims and has introduced testimony tending to show that he is sixty-nine years of age; that he is and has been for some time past suffering from delusions; that he is of unsound mind, and that his delusions are described about as follows:

That at stated times, either at regular or irregular intervals, masked men come to his room at night and take him down a shaft eight hundred or eight thousand feet into the earth, on the ground of the claim that he has some geological knowledge as to the formation of the earth or location of oil, or something else in the earth, and that they want that information from him; and how he gets down there or how he gets out he is unable to tell except that he claims that he is so taken down: and

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he also claims that he is taken out again or that he gets out; and he also claims and testimony has been introduced tending to show that some man who was killed some years ago at the safe works, through the negligence of somebody, comes to his bed at night and stands there with his head cut open and bleeding, as it was on the occasion when the man who was killed received the injury that resulted in his death. He also claims that he, on some occasions, goes out on the roof of a bay-window and sits there; that he wanted to go to Cincinnati to settle up a drug business there; that he used to be in the drug business and that he left that business unsettled when he came to this city, and he wants to go there and settle that up; that on some occasion recently he shot at his wife; he also claims that he is not permitted to retain his clothes, and is thereby prevented from going from home; and it is also claimed and testimony has been introduced tending to show that on some occasion he attempted to build a bridge at the fountain that is on his premises; and he has introduced testimony tending to show that he is a feeble old man, and a mental wreck; and it is claimed in his behalf that the fact that he is confined in the house is evidence that he is treated as a child and as a mental wreck, and that he has no control over matters and affairs about his house, else he would be able to manage his own affairs so as to get his clothing and go out as he pleased. All of these are claimed to be evidences that Mr. Tyler is not sane. It is also claimed that he was indicted for forgery, was arrested, was thrust into jail, that he has lost all of his property, and all taken together was too much for Mr. Tyler's mental condition to bear up under, and that consequently in view of all of it and from all of it he became a mental wreck. And that is substantially what is claimed on the part of the accused, Dominic Tyler.

The state claims on its part that these so-called delusions are feigned delusions; that they are not real; that Mr. Tyler is simply simulating and pretending to be insane to avoid being tried on certain indictments that have been returned against him, and that all these so-called delusions are studied and arranged for the purpose of deceiving people on the pretense that he is insane, and that there is no reality in them so far as he is concerned. That is, that he does not believe them to be genuine; that he knows that when he says men come to take him away that he is simply telling a story to deceive whoever listens to it, and that all the purpose he has in such stories and in these so-called delusions, is to avoid being tried on the indictments that have been returned against him; that it is all a sham and an attempt on his part to deceive, and that these so-called delusions are not insane delusions, and are not, in fact, delusions at all, but merely attempts on his part to deceive; and that his motive is to avoid punishment for the alleged crimes for which he is indicted.

The accused, Dominic Tyler, holds the affirmative on the issue as to whether he is insane. Every person is presumed to be sane until the contrary is shown, so that the burden of proof is on the accused to show by a preponderance of the evidence that he is not sane.

What I mean by the preponderance of the evidence is that the accused must show that he is now at the time of this trial probably not sane. I will repeat that—what I mean by the preponderance of the evidence is that the accused must show that he is now at the time of this trial probably not sane. So that from the whole of the testimony you will determine whether Mr. Tyler is probably not sane. I do not mean

possibly not sane; but if the testimony shows that he is probably not sane, he will be entitled to a verdict finding that he is not sane. And if the testimony does not show that he is probably not sane, your verdict will be that he is sane. It takes but a probability to establish the fact of his insanity.

The question then is, had Dominic Tyler on last Thursday, when this investigation began, sufficient judgment, intelligence, reason, and mental power to observe and know the difference between right and wrong, or having such judgment, reason, intelligence and mental power, had he sufficient will power to refrain from doing the wrong.

This is the test which you will apply to the facts proven in deciding the case which is submitted to you. It is a question of the responsibility of Dominic Tyler for his acts. It is not a question whether he was then medically insane, because he may have been medically insane and yet have had a sufficient perception between right and wrong to make him responsible. A man may be medically insane; insane according to medical science, and yet responsible for his acts in law. Indeed it is generally true that mental unsoundness does not bring with it, necessarily, irresponsibility for crime.

It is not the question here whether Dominic Tyler had on last Thursday a weak mind or a low degree of intelligence, for those things may be perfectly consistent with his sanity in a legal sense.

Weakness of mind is relative; it is not absolute. A weakness of mind which falls short of that nature and degree of mental freedom, or that renders the person whose sanity is in question incapable of distinguishing between right and wrong, would be insufficient to justify a verdict of insanity. The knowledge of right and wrong has been tested by the courts all over this country, and it has been held to be the only safe and is now the only established legal test in the determination of the question.

It has been said in the argument and on the trial of this question that the law is too humane to put a man upon trial or sentence while he is not sane, if for no other reason, that he is entitled to the best energies of his mind in the preparation of his defense and in the conduct and management of his case upon trial; and likewise would the law be too humane to inflict punishment, after a man has been convicted by a jury on an indictment, if he is found to be insane, if for no other reason—that the mind of the man is the part of the man that is punished. It is not his body, it is not his physical frame, but his mind that is punished; and if his mind is wrecked, if his mind is unhinged or unbalanced he could not be punished; and the law therefore provides for just such proceedings as this, either before the trial, or after the trial and before sentence, to the end that persons who are not sane may not be put upon trial, and to the end further that persons who are not sane may not be subjected to the infliction of punishment.

But persons who are sane cannot escape and have no right to escape from their just deserts under a simulated claim of delusion or a claim of insanity that is not made out to such extent as to establish the fact that he is probably not sane.

Then taking into the account everything that is to be considered by you, everything that you have heard from the lips of the witnesses, in the light of these instructions, you are to say whether the mental capacity of Dominic Tyler was of such a degree and character at the time of the commencement of this trial as that he could have distinguished right

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from wrong, and had will power sufficient to have rejected the one and accepted the other. It is this rule of law by which you must be governed in deciding this case.

Now, gentlemen, you will go over all of this testimony and give it such weight as in your judgment it is entitled to, and determine from it the issue submitted to you in this investigation; and in reaching a conclusion take into the account the age of Mr. Tyler, his former life, his history, his standing in society, and determine from all of that, together with the testimony of the expert witnesses, whether these so-called delusions are real or feigned, and then determine the ultimate question—whether Mr. Tyler was, at the commencement of this investigation, to-wit, last Thursday, capable of determining right from wrong, and whether he had sufficient will power, if right and wrong were presented to him, to accept the right and reject the wrong. If he had sufficient knowledge and mental capacity to determine right from wrong, and sufficient will power to accept the right and reject the wrong, he would not be insane; and if he had not sufficient mental power and capacity to know the right from the wrong, or had not sufficient will power to accept the one and reject the other he would be not sane, or insane, and you should so find as you find these facts to be.

So in determining these issues, simply determine as to his capacity to judge right from wrong and carry out that judgment by his will power. If he has that capacity and that will power he is, so far as this investigation is concerned, to be found sane.

If he has not that capacity and will power both, he should be found to be not sane.

You will, upon retiring, appoint one of your number foreman. I will have two forms of verdict sent you, each of which will entitle the cause. One will say in substance we find that Dominic Tyler at the commencement of this trial was not sane. The other will say in substance we find that the said Dominic Tyler at the commencement of this trial was sane. Whichever of these forms you adopt, have your foreman sign it; and bring it with you into court. The concurrence of nine of your number will constitute a sufficient number to return a verdict either way, and if nine of your number agree upon a verdict either way your foreman should sign it, no matter whether he be one of the nine or not, if there are nine others, and return it with you into court, as the verdict of the jury.

You may retire.

Verdict, "sane."

LIFE INSURANCE.

[Franklin Common Pleas, 1898.]

MARY KRITLINE V. ODD FELLOWS' BENEFICIAL ASSN.

A person paying premiums upon a policy of life insurance has an equitable right and interest in the proceeds.

BIGGER, J.

This case involved the life insurance money upon a policy of \$2,000, on the life of one Thomas Arnold, which policy was issued by the Odd Fellows' Beneficial Association. The conditions were something in this

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order: For a number of years preceding the death of Mr. Arnold, he had been financially unable to keep the policy in force, and during this period the regular assessments were paid by Miss Mary Kritline, with whom an understanding was had that she should share the returns from the policy whenever it became payable from whatever reason. Mr. Arnold died in 1897, and the payment of the policy became a matter of contest between Miss. Kritline and the heirs of the deceased. The decision follows a recent decision of the circuit court, that a person paying the premiums upon a policy has an equitable right and interest in the proceeds.

EXEMPLARY DAMAGES.

[Magistrate's Court, Toledo, Lucas Co., 1898.]

CHARLES CARR V. TOLEDO TRACTION CO.

An action against a street railway company for failure to properly transfer a passenger is one in which exemplary damages may be allowed.

KENYON, J. P.

According to the evidence, Carr boarded a Summit avenue car and tendered a transfer check in payment of his fare. He had the wrong transfer and the conductor collected the fare. Carr testified that he enquired of the conductor as to whether the car went down Summit avenue, and was answered in the affirmative. Upon arriving at Riverside Park he was transferred to another car, and that conductor collected another fare, Carr having no transfer. The company claimed that they were liable for only ten cents which the passenger was overcharged in his transit.

To say that the damage in this case was only the ten cents extra that the plaintiff paid would be to say that the street car company could refuse transfers to anyone and the only damage they could be compelled to pay would be the price of a fare, and would practically deny the right of all passengers to transfer, for no one would engage in a lawsuit with the precedent established that they could only recover the price of a street car fare—nor should such damages be awarded as would induce people so disposed to sue the company on trifling charges for speculation.

The case is a peculiar one, and of more importance than the seeming trifling amount involved—as it is the multitude of these trifles that make up the vast business of our street car business, and I think, for that very reason, one to which the principle of exemplary damages especially applies.

In conclusion judgment is given in the sum of ten cents as the amount of the damages in money; \$5 for plaintiff's attorney's fees, and \$5 as exemplary damages.

PURE FOOD LAWS.

[Lucas Common Pleas, 1898.]

STATE V. MARVIN.

1. Deception as used in sec. 3718a, Rev. Stat., means deception because of or the result of adulteration and deception caused by the imitation and counterfeiting of the natural products of food, such as cheese, butter, and all artificial counterfeit foods and drinks.

2. Unlawful labeling, or the sale of morphine in a patent medicine, without a "poison" label, is an offense separate from the adulteration and deception in the sale of foods and drugs and is not within the jurisdiction of a justice of the peace.
3. Whenever a statute admits of two constructions the presumption should be that the legislature intended to do that which is clearly manifest and just. And the presumption against absurdity in the provisions of a legislative enactment is probably a more powerful guide in construction than the presumption against inconvenience and injustice. When, therefore, to follow the words of an act leads to an absurdity in its consequences, that constitutes sufficient authority to depart from them.
4. Under the rule above stated it can hardly be held that the legislature, in the enactment relative to the sale of poisons, intended to include well known proprietary medicines, containing so little poison that the effects are beneficial rather than injurious. Such a construction, which would include nearly every physician's prescription and ordinary remedies, is unwarranted, unsound and unreasonable.
5. In a prosecution for the sale of poison, without label, in the manner described, evidence that the mixture was not only a proprietary remedy of long standing but was also a useful remedy in medicine, that it was non-poisonous and that the effects of said mixture were restorative and curative, is competent and should be admitted.

BARBER, J.

The charge upon which the defendant was convicted and sentenced is found in an affidavit filed in the justice's court on November 16, 1897, that "on or about the fourteenth day of October, 1897, he unlawfully sold to Frederick W. Herbst a quantity of morphine, the same being then and there an article belonging to the class usually denominated poisons, said morphine being contained in a certain bottle labeled Mrs. Winslow's Soothing Syrup, then and there without having marked the word 'poison' upon the label or wrapper containing said article."

In the justice's court the case was decided against the defendant, and Judge Barber reversed the decision of the justice on the ground that the justice had no jurisdiction of the offense; and for the further reason that the court erred in the exclusion of evidence and also that the justice erred in his charge to the jury.

This question was raised in every conceivable way known to the practice, and in ways not known. It is claimed on the one side that the justice had no authority to summon a jury and try Mr. Marvin upon this charge, and on the other side that the justice had ample jurisdiction to empanel a jury and pronounce judgment upon the conviction of defendant.

Courts of common pleas have original jurisdiction of crimes and offenses, except in cases of minor offense, exclusive jurisdiction of which is vested in justices of the peace. The court cannot see that it was contended by the state that a justice of the peace had jurisdiction in the matter only as specially provided by the legislature in sec. 3718a, Rev. Stat., which in substance provides that any justice of the peace within his county and city shall have jurisdiction in cases of violation of the laws to prevent the adulteration and deception in the sale of dairy products and drugs and medicines.

The word "adulteration" is most explicitly defined by statute in the chapter regulating that subject. The word "deception" is nowhere defined by the statute. We approach this question, then, with obscurity. The word "deception" has no statutory definition. Adulteration is a crime defined by law.

"Deception," as used in the section, means deception because of or the result of adulteration and deception caused by the imitation and counterfeiting of the natural products of food, such as cheese, butter and all artificial counterfeit foods and drinks.

The last reason that I care to give supporting the adopted construction is that the legislature itself has classified offenses of the kind charged against Marvin as different from offenses against adulteration and deception in the sale of foods and drugs. In the act creating the dairy and food department we find this explicit language: "The commissioner is charged with the enforcement of all law against fraud and adulteration or impurities in foods or drugs and unlawful labeling in Ohio." Could there be a more satisfactory and distinct recognition of two classes of offenses? If this is not a deliberate legislative recognition of a distinction between unlawful labeling and adulteration and deception in the sale of foods and drugs I am wholly incapable of understanding the English language.

The responsibility of deciding these numerous questions, as to errors occurring at the trial, might easily and properly be avoided for the reason that the judgment must be reversed, upon error, in exercising jurisdiction, but as the case is going to the Supreme Court and as it is very desirable to get the construction of that court upon all of these questions I willingly consider and decide them.

It will be well to note here briefly the transaction itself which is claimed to be criminal. Mr. Herbst, one of the drug inspectors, purchased of Marvin the bottle of Winslow's Soothing Syrup. He asked for no article belonging to the class usually denominated poisons. He asked for an article which the defense offered to show was a well known proprietary remedy or patent medicine of nearly fifty years' standing. The defense offered to show that this mechanical mixture was not only a proprietary remedy of long standing, but was also a useful remedy in medicine, and it was offered to prove by physicians of unquestioned standing and ability in this community that the mixture was non-poisonous and the effects of said mixture were restorative and curative. Such evidence was excluded.

It is submitted that the construction of the statute contended for by the state is unwarrantable, unsound, unreasonable, contrary to the plain meaning of the language used and leads far beyond the intention of the legislature. The construction contended for by the state is harsh and severe and creates offenses which entrap the unwary.

The construction adopted by the court below renders criminal millions of transactions that have occurred in Ohio during the past fifty years and are occurring daily. For the prescription of every physician containing morphine or opium or strychnine or arsenic that is given as a medicine, and that is filled by the druggist, would have to be labelled a poison. If the mixture or medicine so sold contains so little of the poison that the effects are beneficial and not injurious, the statute would soon be violated. Is it possible that this statute is to be so construed that prescriptions of physicians and these ordinary remedies are to be labeled poisons? Clearly not. And the best argument is that it was never thought of in Ohio until this prosecution.

Whenever a statute admits of two constructions we are bound to presume that the legislature intended to do that which is clearly manifest and just. The presumption against absurdity in the provisions of a legislative enactment is probably a more powerful guide in construction

than the presumption against inconvenience and injustice. The legislature cannot be supposed to contend its own stultification. When, therefore, to follow the words of an act leads to an absurdity in its consequences, that constitutes sufficient authority to depart from them.

The defendant offered to show that the sale of Mrs. Winslow's Soothing Syrup was not the sale of a poison, but the sale of a medicine as such. He offered evidence tending at least to show that the morphine in it was so small that the mixture was valuable as a medicine. In fact he offered to show that the mixture was non-poisonous and a useful and valuable remedy. Testimony of this kind should have been admitted, for no one can decide whether the transaction was criminal without all the facts of the transaction before him.

The practical construction given to this section for now nearly half a century has been directly contrary to the construction urged. Until this case was prosecuted no one ever thought that this law required the numerous prescriptions which druggists of Ohio have filled containing morphine or other poisons to be labeled as poisons. It is a fact beyond dispute that nearly one-third, at least one-fourth, of all the prescriptions given by physicians in Ohio contain poisons, morphine and opium being common poisons prescribed. It is a fact further that these prescriptions as a rule contain more of such poisons relatively than the mixture sold by Marvin.

The judgment is reversed for the reason that the court has no jurisdiction of the offense, for the further reason that the court erred in the exclusion of evidence and erred in his charge to the jury, and for the still further reason that the verdict of the jury is against the evidence and contrary to law.

DOGS.

[Hamilton Common Pleas, 1898.]

FAGIN V. HUMANE SOCIETY OF CINCINNATI.

1. The statute providing that dogs in Cincinnati shall be liable to a tax of \$2.00 or be disposed of if not paid, is an act of a general nature, and being made applicable to Cincinnati only, is unconstitutional for lack of uniformity of operation.
2. Dogs are property in Ohio, and inasmuch as the act in question provides for the taking of these animals without due process of law it is unconstitutional on that ground.

SMITH, J.

It was sought to enjoin the Humane Society from disposing of a dog belonging to the plaintiff, which right the society claimed under the act providing that dogs in Cincinnati shall be liable to a tax of \$2.00 each, or be disposed of if not paid, the money to be collected and the act enforced by the society.

Held, that the act is of a general nature, inasmuch as dogs are found in all parts of the state, but it is made applicable to Cincinnati only, and is, therefore, unconstitutional for lack of uniformity of operation.

It is further held that in Ohio it is well settled that dogs are animals of value, and, therefore, property; and inasmuch as the act in question provides for the taking of these animals without due process of law, it is unconstitutional on this ground also.

The questions of double taxation and of the right of a corporation to profit by the proceeds from such a law, or to assume police powers, raised in the arguments of counsel, were not passed upon by the court. The injunctions were granted.

MONEY DRAWN BY COUNTY AUDITOR.

[Ottawa Common Pleas.]

OTTAWA CO. (COMRS.) V. AUDITOR.

1. The rule that payment of money voluntarily made cannot be recovered back in the absence of fraud or mistake, although it may appear that the money was not due or owing, is applicable to the claims of a county auditor examined and allowed by the county commissioners.
2. The rule that money paid under a mistake of law cannot be recovered from the party receiving it, is also applicable to the claims above referred to.
3. The fact that the persons appointed by the court of common pleas, and the prosecuting attorney, examined the county commissioners' report, which included claims of the county auditor, and reported it correct, is no defense to an action against the auditor for money claimed to have been illegally drawn from the treasury on warrants approved by commissioners.

KELLEY, J.

Suit was brought in the Ottawa county common pleas, the petition for which contained fifty-nine causes of action against the county auditor, some of them charging him with drawing from the treasury, on his warrants, fees for services for which the law had provided no compensation at all, and others with drawing amounts upon his warrants in excess of the fees allowed by law.

The auditor answered: 1st. That his claim in each case was presented to the board of county commissioners in writing at their regular or special sessions and was duly examined and allowed by them, and that his warrants were in no cases drawn except after such allowance. 2d. That each year the court of common pleas had under the statute appointed two persons, who, with the prosecuting attorney, had examined the commissioners' report, including the claims referred to in the petition, and had reported them correct.

To each of these defenses the plaintiff filed a general demurrer. The court overruled the demurrer to the second of the defenses, and sustained it as to the first. One ground of the decision was, that the rule applicable to individuals, that payment of money voluntarily made cannot be recovered back in the absence of fraud or mistake of fact inducing the payment, although it may appear that the money was not due or owing, and that money paid under a mistake of law can in no case be recovered from the party receiving it, was applicable to the board of commissioners, and as no fraud or mistake was alleged, the plaintiff, on the face of the pleadings, was not entitled to recover. Citations: *People v. Supervisors*, 65 N. Y., 222; *Advertisers v. Detroit*, 43 Mich., 116; *McArthur v. Luce*, 43 Mich., 435; *Holmes v. Lucas Co.*, 53 Iowa, 211; *Comrs. v. Noyes*, 35 U. S., 201; *Comrs. v. Gherky, W.*, 493.

DISBARMENT OF AN ATTORNEY.

[Montgomery Common Pleas, May, 1895.]

IN RE CHAS. E. SWADENER.

1. Inasmuch as good moral character is one of the requisites for admission to the bar, it follows, as a necessary sequence, that the courts (whose officer, under a life tenure, an attorney is) have power of removal when such character is wholly lost. This power is inherent and exists independent of statutory provisions.
2. While authorities are not entirely harmonious as to whether mere delinquency as ordinary trustee is ground for suspicion or removal of an attorney, yet authorities generally hold that offenses which are evidence of criminal character, as appropriating money collected in a fiduciary capacity, are grounds for suspension or removal.
3. Disbarment proceedings are not by way of punishment nor to enforce a settlement with the injured party. Therefore, the fact that an attorney has been punished criminally, or has fully settled all claims made, will not relieve him from the penalty of suspension or removal for misconduct.
4. In cases like the one at bar, where an attorney, during a period of four to seven years, by his own admission, had been guilty of converting nearly \$30,000 to his own use, as attorney, guardian, assignee or individual, the leniency of the court should be exercised, if at all, when after the lapse of sufficient time the attorney has shown by his conduct that he is worthy of re-instatement, rather than by anticipating some time when he may be worthy of re-instatement.

SMITH, J.

The charges in this matter are eleven in number. They embrace various acts of unprofessional conduct, involving moral turpitude, breaches of trust and dishonest practices, extending over a period of four years, or about seven years, if the matter of his appointment as guardian of certain minors be taken into consideration, and involving wrongful conversion by him, either as attorney, guardian, assignee, or individual, of the sum of \$29,812.66. By the withdrawal of the answer each of said charges is confessed to be true.

Before one can be admitted to examination, even as an applicant for admission to the bar, among other things he must produce a certificate that he is of good moral character. Good moral character being a prerequisite to admission, it follows as a necessary sequence that the courts, whose officer he is, he holding under a life tenure, have a power of removal when such character is wholly lost. Especially is this true where there are charges of dishonesty, breach of trust and want of integrity. The power of suspension or removal is inherent in the court. It exists independent of statutory provisions. And it has been held by various courts that, although grounds of removal or suspension are set forth in the statute, it does not preclude suspension or removal for goop grounds not mentioned therein. While the authorities are not entirely harmonious as to whether a mere delinquency as ordinary trustee is ground for suspension or removal, yet the authorities generally hold that offenses which are evidence of a criminal character, as appropriating money collected by an attorney acting in a fiduciary capacity, are grounds for suspension or removal. 64 Maine; 36 New York; 11 Oregon; 58 New Hampshire, and cases therein cited.

These and like decisions are certainly in harmony with principles on which courts act in these matters, for it would be an anomaly in law that, while requiring a certificate of good moral character as a prerequi-

site to examination for admission, after once having obtained admission, however dishonest or corrupt an attorney may become, he cannot be removed by the courts so long as such conduct does not involve him in his professional capacity.

Proceedings of this nature are neither by way of punishment nor to enforce settlement with the injured party. Punishment for offenses made criminal is provided for in the penal code, and in the collection and settlement of claims against attorneys suitors are remanded to the courts of law. Therefore, the fact that an attorney has been punished criminally, or has fully settled all claims made the basis of proceeding, will not relieve him from the penalty of suspension or removal for such misconduct. 64 Maine; 8 Colorado: 93 Pennsylvania State.

As stated in the latter case, in the opinion:

"It is contended on the part of the plaintiff in error that this settlement operated as an absolution and remission of his offense. This view of the case ignores the fact that the exercise of power is not for the purpose of enforcing civil remedies between parties, but to protect the court and the public against an attorney guilty of unworthy practices in his profession. He has acted in clear disregard of his duty as an attorney at the bar and without good fidelity to his clients. The public had rights which Mr. Curtiss could not thus settle or destroy. The unworthy act had been fully consummated."

There is, then, presented a case wherein, in eleven different instances, an attorney, during the period of from four to seven years, has by his own admission been guilty of the conversion, not to use a harsher term, of nearly \$30,000, the greater portion of which has been adjusted in some manner, either since the charges were filed or the committee appointed.

The fact that a man has good habits and stands high in the community is not to his discredit so long as he deserves such reputation. But the very fact of such standing without integrity and a high sense of honor makes such a man, when clothed with the powers, the duties and opportunities of an attorney at law, a most dangerous man in any community. How can this court hold out to the public one guilty of such offenses as subject only to a short suspension? The bar of this state, active for years in raising the standard of the requirements for admission, have certainly not lost sight of the first essential requisite, strict integrity in its fullest sense.

Confession of the truth is better always than a denial of the truth; but in a case like this, it seems to me that the leniency of the courts should be exercised, if at all, not by way of anticipating some future time when the attorney may probably be worthy to be clothed again with the powers, opportunities and responsibilities of the office, but rather when after the lapse of a sufficient length of time he has shown by his past conduct that he is at least worthy of reinstatement, and that the honor of the bar and the rights of the public will not suffer thereby. It should be based not upon what he may do in the future, but upon past conduct, upon which the court can be fully warranted in acting, and then only upon strong grounds as a basis for such action.

Holding then, these views, as an officer charged with the duty of administering justice without respect to persons, the order will be that said Charles E. Swadener be removed from office as an attorney at law. And under the amendment in vol. 91 the committee in this case will be allowed \$100 each.

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A like order will be made in the case of the matter of charges against Charles D. Iddings, for reasons already stated herein.

The accused gave notice of appeal, and Judge Smith fixed their bond at \$100 each.

CRIMINAL LAW.

[Clark Probate Court, November 23, 1894.]

STATE EX REL. PARKS V. T. E. LOTT.

A person committed to jail by an examining magistrate is entitled to his discharge on habeas corpus where the next regular grand jury, after his commitment, did not return an indictment against him, unless the same was omitted for some cause mentioned in sec. 7211, although the term has not yet expired, and it is within the power of the judge to convene a special grand jury.

ROCKEL, J.

The complainant files his petition for a writ of habeas corpus which is as follows:

Your petitioner, Samuel Parks, respectfully represents that he is imprisoned and restrained of his liberty by Thomas E. Lott, sheriff of said county, in the county jail of said county, without any legal authority, but under color of a certain commitment of which the following is a true copy, viz:

"State of Ohio, Clark county, ss:

"To the Keeper of the Jail of the County, greeting:

"Whereas Samuel Parks has been arrested on the oath of J. M. Lynch for unlawfully taking and stealing one bay colt with two white hind feet, the property of J. M. Lynch, of the value of one hundred dollars, and has been examined by me on such charge and required to give bail in the sum of one hundred dollars for his appearance before the court of common pleas of said county, on the first day of the next term thereof, with which request he has failed to comply. Therefore, in the name of the state of Ohio, I command you to receive the said Samuel Parks into your custody in the jail of the county aforesaid, there to remain until he shall be discharged by due course of law.

"Given under my hand this eighteenth day of July, 1894.

"JOHN W. YEAZELL, Justice of the Peace.

"I hereby certify that the within is a true copy of the original writ.

"GEORGE GLADFELTER, Const."

Your petitioner further says that he had been imprisoned in said county jail under said commitment ever since the nineteenth day of July, 1894; that the regular grand jury for the term of said common pleas court next after said commitment of petitioner to said jail as aforesaid, to-wit, the regular grand jury for the term of said common pleas court, beginning October 8, 1894, on which latter date said grand jury was finally discharged by said common pleas court; that said grand jury found no indictment whatever against said Samuel Parks; that no transcript of the proceedings of said justice of the peace upon said charge against said Samuel Parks has been filed in said court of common pleas or with the clerk thereof; that no criminal prosecution whatever against said Samuel Parks is pending in said court of common pleas.

Therefore the said Samuel Parks prays that a writ of habeas corpus may be issued to said Thomas E. Lott as sheriff as aforesaid, and that

he, the said Samuel Parks, may be discharged from his said imprisonment and restraint of liberty.

his
SAMUEL X PARKS
mark.

The facts in this complaint are the admitted facts of the case, except that since the filing of this application a transcript has been filed. Therefore the question arises, whether there now exists under this condition of affairs any legal right for the sheriff to detain the prisoner. It is so extremely novel in its nature and character, that neither the counsel nor myself have been able to find any decision to throw a glimmer of light on the path to follow. It is a constitutional guarantee, brought down from the magna charta, that every one who is charged with a crime be given a speedy public trial. To preserve this right is one of the great purposes of the time honored and revered writ of habeas corpus. As was said by Bowen, J., in 6 Ohio St., 559: "No matter where or how the chains of captivity were forged, the power of the judiciary in this state is adequate to crumble them to the dust, if an individual be deprived of his liberty contrary to the law of the land."

It is also by our constitution provided that no person shall be deprived of his life, liberty or property without due process of law. These constitutional provisions are referred to for the reason that all our statute law must be subservient to them. Such law is always presumed to be made in conformity with our organic law and to carry into effect its provisions in the true spirit of their intendment. Bearing these principles in mind, our statutes will now be considered as bearing upon the case at bar.

It is provided by section 457, that at least three terms of common pleas court be held in each county during each year; and that upon the first day of each term a grand jury shall be impanelled to inquire into crimes committed, and true indictments present. It is further provided, sec. 7189, and it makes it the duty of the clerk of the court to make out a transcript of the names of all persons who appear by the return of magistrates to have been either committed or bailed for an offense during the vacation of the court, which shall be delivered to the foreman of the grand jury.

And as an additional safeguard that the case may not be omitted by reason of negligence of the foreman of the grand jury, it is also provided that a copy with the transcripts be delivered to the prosecuting attorney. These provisions show that it is the purpose of the law that a speedy trial and opportunity of hearing be given to a person accused of crime, by providing for frequent sittings of the court, and making it the duty of two sworn officers to inquire into such crimes, and if proper present an indictment.

It is further provided, by sec. 7147, that if it becomes necessary during the continuance of the examination of the accused that he be committed to jail that the whole time of such confinement shall not exceed four days.

Why forbid a person to be confined in jail upon a preliminary hearing not more than four days and permit an accused to be incarcerated in prison for a period of six months, as will be the case at bar if the accused is held until the end of the present term or the next session of the grand jury, is not clear to my mind. The statute provides that the justice shall forthwith file a transcript, and the clerk of the court shall

at once place the same upon the appearance docket. Forthwith, means that it should be done within a reasonably short time, and it is a very serious question whether, if this be not done, an accused person committed to jail could even be held until the first regular session of the grand jury. It seems, that the purpose of the law is, that the records of the court of common pleas should show the pendency of the cause and the various stages of its proceedings. But the complainant's ground for discharge does not rest alone upon a failure to file a transcript. And the filing of the transcript since the adjournment of the regular grand jury, and also since the filing of this application, will not materially affect the complainant's right to discharge. Section 2211 provides: "If a person held in jail charged with an indictable offense be, not indicted at the term of court at which he is held to answer he should be discharged, unless he was committed on such charge after the discharge of the regular grand jury for the term, in which case the court may either discharge him or order a new grand jury, or require him to enter into a recognizance, with sufficient surety, for his appearance before the court, to answer such charge at the next term thereof; but the person so held in jail without indictment shall not be discharged if it appeared to the court that any witness for the state has been enticed or kept away or detained or prevented from attending court by sickness or unavoidable accidents."

But it is said that the complainant is not entitled to discharge under this section because the term of the court of common pleas to which he was held to answer is still in session; and that, although the regular grand jury has adjourned, it is possible that a special grand jury may yet convene at which he might be convicted. There is nothing in the present case to show that the complainant was not indicted or his case not considered because a witness was enticed away or detained by sickness or unavoidable accident. The statutes nowhere provide specifically what term of court a person accused of crime shall be committed to answer; but it is provided, sec. 7147, that if a magistrate believes the prisoner guilty, he shall order him to enter into a recognizance for his appearance at the proper time before the proper court.

Section 7161 designates when is the proper time and which the proper court when it says: "A recognizance shall be taken for his appearance to answer the charge before the court of common pleas on the first day of the next term thereof." The mittimus in the present case shows on its face that the complainant was bound over in conformity to the above provision. It is further contended in behalf of the state that because a person held under indictment may be detained in prison for at least two terms after the indictment is found, that therefore it is not unreasonable to suppose that the law intends that a person committed to answer to the next term of the court shall be compelled to wait the entire term. But the cases are not similar. Before indictment the prisoner has no voice as to the time or manner of his hearing; he has no right to appear before the grand jury or in the court to insist upon the consideration of his cause. But after indictment he has a standing in court; a right to appear and be heard in person or by counsel before a court which it is presumed will give him a reasonably speedy trial as by the constitution guaranteed. A special grand jury exists only in the discretion of the judge, but the right to the regular session of the grand jury is guaranteed by law at a certain fixed time. This complainant had a right to expect that every officer of the law

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would do his duty. He had a right to expect that the justice of the peace would forthwith file a transcript; that the clerk would docket the case, and deliver his name to the foreman of the grand jury that would convene next thereafter, and also deliver a transcript of such proceedings to the prosecuting attorney; that such grand jury would consider his case. Aye more, standing behind the prison bars, deprived of his liberty, he had a right to demand that these officers perform their sworn duty.

That these officials did not perform the duties enjoined upon them by law is no fault of his. Whatever the law requires from him has been done. By its strong arm he has lingered in prison awaiting its decree, trusting that it would be done at the time and in the manner provided by the laws of our land. To hold him responsible for something over which he had no control is neither law nor justice. To deprive him of his liberty by reason of the failure of a public official to perform a duty enjoined upon him by law, would be the enunciation of a doctrine fitted only to the dark ages of a semi-civilized world. Believing that the complainant ought not to be longer held by the sheriff under the present commitment, he is ordered discharged.

CHattel Mortgages.

[Clark Probate Court.]

MARY FORD V. J. J. MILLER, ASSIGNEE.

1. Where it is a part of the mortgage contract that the mortgagor is to remain in possession and sell, and there is no agreement to account for the proceeds, the mortgage is *per se* fraudulent and void as to other creditors.
2. But where the mortgagor remains in possession merely by sufferance and sells, the mortgage is not *per se* fraudulent.
3. A chattel mortgage to the mortgagor's wife for a valid debt will not be held fraudulent and void as to other creditors, because the mortgagor was permitted to remain in possession and sell the goods for a few hours without any agreement to account for the proceeds.
4. Although a chattel mortgage on a stock of goods is presumptively fraudulent where the mortgagee permits the mortgagor to remain in possession and sell the goods without an agreement to account for the proceeds, such presumption may be overcome by showing the good faith of the parties, and that no actual injury resulted to creditors thereby.

ROCKEL, J.

In 1894, George Ford was the owner of real estate to the value of \$3,000.00. Thereafter this was mortgaged for \$2,000.00, with which the said George Ford opened a retail shoe store, under the name of Ford & Brice. Mr. Brice had no interest in the store other than being an employee. The creditors were so informed.

On July, 1895, George Ford sold his real estate for \$3,000.00, paid the mortgage indebtedness, gave \$800.00 to May Ford, his wife, and used the balance in the business of Ford & Brice.

This \$800.00 was given to Mrs. Ford as her interest in the real estate, and by her deposited in the bank in her own name.

At this time the store of Ford & Brice invoiced over \$3,000.00, and the liabilities were \$500.00 or \$600.00. The business was not prosperous, and at different times George Ford borrowed money from his wife o put in the business until the entire amount was exhausted.

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Mrs. Ford became solicitous about her money, and on a number of occasions demanded that she be secured.

On July 11, 1896, Ford, Brice and Mrs. Ford met in the office of Mr. Burnham, an attorney, and there a paper was drawn up reciting the fact that Brice had no interest in the concern, but if he had any it was assigned and transferred to Mr. Ford.

A chattel mortgage was then made in the usual form to Mrs. Ford securing her claim of \$800.00, which was delivered to the recorder of this county at 4.20 o'clock P. M. of the same day. Some time after the execution of this chattel mortgage, Ford executed a deed of assignment to J. J. Miller, Esq., which was delivered to the probate judge at 9 o'clock P. M. of the same day. Thereupon the assignee appeared at the place of business, and took possession of the store. Goods were sold after the execution of the mortgage until the assignee took possession in the usual retail way.

There was no agreement, either written in the mortgage or otherwise, that Ford should retail or sell any of the goods. Mrs. Ford was at the store almost all the time after her mortgage was given until the assignee took possession.

The money received for goods sold, after some help was paid, was taken by her; but she never took formal possession under her chattel mortgage.

The property assigned was appraised at \$2,500.00, and schedule filed showed liabilities amounting to \$2,400.00.

It is claimed by some of the general creditors that where a mortgagee permits the mortgagor to remain in possession, and sell the mortgaged goods, without an agreement to account for the proceeds, that the mortgage as against creditors is *per se* fraudulent and void.

When it is a part of the contract that the mortgagor is to remain in possession and sell, and there is no agreement to account for the proceeds, I have no doubt the mortgage is *per se* fraudulent. But where such things are done by the mortgagor, not under contract, but merely by sufferance, I am of the opinion that the mortgage is not *per se* fraudulent.

Such conduct of the parties will raise a presumption that the mortgage is fraudulent, but this presumption may be overcome by showing the good faith of the parties, and that no actual injury resulted to creditors thereby.

In *Freeman v. Rawson*, 5 Ohio St., 12, it is said: "From the considerations and authorities we have adduced, we are of the opinion that these conclusions necessarily follow:

"That a mortgage of personal property, with possession, and a power of disposition reserved to the mortgagor, is fraudulent and void as against his other creditors. If the power of disposition appear on the face of the mortgage, as fairly to be inferred from its provisions, it is the duty of the court so to declare it, without submitting the matter to the jury as a question of fact. If it does not so appear, but is understood or agreed by the parties at the time the mortgage is executed, it is equally void; and such understanding or agreement may be shown by parol evidence, and may be proved by conduct of the parties in relation to the subject matter of the mortgage, and other circumstances as in other cases. And that, in either case, where the fact is made to appear, the mortgage is fraudulent in law, irrespective of the intention of the parties."

It should be observed that here the court bases its conclusion upon the fact that the power of disposition was a part of the mortgage contract either inserted in the mortgage or otherwise understood between the parties. It does not apply to after contracts or conduct, except so far as the same might throw light upon the mortgage contract. In the case at bar there is no evidence to show that possession with power of disposition was reserved to the grantor, at the time the mortgage was executed. Again in *Kleine v. Katzenberger*, 20 Ohio St., 117, after an examination of all the Ohio cases it is said: "Where it is said, therefore, that a mortgage of personal property, with possession and a power of disposition reserved to grantor, is fraudulent and void as against his other creditors, we are to understand this as referring to a power of disposition for the mortgagor's own benefit. It is only where the power of sale is such as to leave in the mortgagor a dominion over the property, inconsistent with the alleged lien of the mortgage, that the mortgage has been held *per se* fraudulent and void. In none of these cases was it necessary to go further; and this is the extent of the authorities cited in their support."

It will be noticed here that the court calls particular attention to the fact that the power of disposition for the mortgagor's own benefit was the reason for holding the mortgage fraudulent, and also that the power of sale leaves such dominion over the property that a lien could not be held consistent therewith.

In the case at bar there was no agreement that the mortgagor should sell the goods for his own benefit, nor did he even attempt so to do.

Having arrived at the conclusion that the mortgage in question is not *per se* fraudulent, it will next be in order to consider whether it is in fact fraudulent and void as to the general creditors.

The evidence does not disclose very clearly whether it was really the intention of the mortgagor to deliver possession to the mortgagee. It does, however, show that the mortgagee was at the place of business almost continually from the time the mortgage was executed until the assignee took possession, and that while there was no agreement to account for the proceeds, yet she took possession of all the money received, except what was paid to the hired help. In the case of *Stevens v. Breen*, 75 Wis., 599, it is said: "It is claimed that the mortgage, even if given to secure a subsisting indebtedness due the plaintiff, was fraudulent because he did not take immediate possession of the mortgaged stock. The mortgage was executed on the fifth of October, 1888. And the debt became due the next day, which was Saturday. It appears that the mortgagor continued in possession of the goods until the next Monday morning.

"It is said he continued to sell goods from the stock, and applied the proceeds to his own use. The fact that he made such sales and did not account for them is not very clearly established. Suppose he did. The jury found that there was no understanding or agreement between the plaintiff and the mortgagor that the latter should remain in possession of the goods, make sales and apply the proceeds to his own use."

In the case at bar the sale of goods only lasted from 4:20 to 9 p. m., the mortgagee took the proceeds, and the possession of the mortgagor, if it existed at all, was only by sufferance, and not by agreement.

In *Chicago Lumber Co. v. Fisher* (Neb. 1885), 25 N. W., 341, in which an Ohio case is quoted from, it is said: "It is not the specific sale of a few articles of inconsiderable value with the consent of the mort-

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gagor that makes a mortgage fraudulent; but where such sales are made in the usual course of trade, where there is a floating mortgage which attaches, swells and contracts as the stock in trade changes, increases or diminishes, or may wholly expire by the entire sale and disposition, at the will of the mortgagor, such is no certain security upon specific property. * * *

"In such case the whole right to dispose of the property to pay a debt depends on the will of the debtor. *Collins v. Myers*, 16 Ohio, 554."

In the case under consideration the number of articles sold could not be many or of very great value. What would be disposed of in a small retail shoe store in the dull season of the year from 4:20 to 9 p.m.? There is no evidence that any creditor suffered any injury by reason of the conduct of the parties in continuing the business from 4:20 to 9 p.m. No attempts were made to incur new obligations, or pay old ones other than the mortgage indebtedness and preferred labor claim. It is difficult to discover sufficient wrong to establish fraud from the conduct of the parties after the execution of the mortgage. And it is not seriously contended that the conduct of the parties before and in the execution of the mortgage was such as would make the mortgage fraudulent and void as to other creditors.

An entry may therefore be put on, ordering the assignee out of the proceeds in his hands to pay the said mortgage claim of Mrs. Ford.

M. T. Burnham, for Mrs. Ford.

Oscar T. Martin, for creditor.

SETTLEMENT OF ESTATES.

[Clark Probate Court.]

IN RE ESTATE OF JEREMIAH RIERDON.

1. The widow and minor children not being required to make a demand to secure a year's allowance, mere lapse of time will not be considered as a waiver or relinquishment of such right.
2. A widow does not waive her claim to a year's allowance by electing to take under her husband's will, although such will directs that there shall be no appraisement, and an appraisement is necessary to such allowance.
3. A widow does not, by electing to take under her husband's will, which gives her a life estate in the realty and all the personalty, forfeit her claim to a year's allowance, under sec. 5964, Rev. Stat., providing that an election to take under the will shall not bar the widow's right to receive the year's allowance, unless the will "shall expressly otherwise direct."
4. Where no appraisement of an estate has been made, and thereby no year's allowance set off to the widow and her minor children on her application, such appraisement will be ordered any time while said estate remains unsettled.
5. If any portion of said estate has been used by the widow for her support, the same should, under sec. 6040, Rev. Stat., be taken into consideration by the appraisers in making such allowance.

ROCKEL, J.

In July, 1890, Jeremiah Rierdon died testate, leaving a widow and two minor children under fifteen years of age. At the time of his death he was seized of realty of the value of about \$3,000.00 and personalty consisting only of household goods.

In re Estate of Rierdon.

The will provided that the widow should have a life estate in the realty, and the personal property absolutely. No provision or mention was made in the will about the widow's year's allowance.

One Joseph Bolan qualified as executor, and sold part of the real estate, applied the proceeds towards the debts of decedent, and resigned his trust. The will requested that no inventory be made, and none was made by the executor.

The widow elected to take under the will. When Bolan resigned there was still a mortgage debt on the remaining real estate unsatisfied. The widow took possession of the real estate, collected the rents, and applied some, I think, of the proceeds to the payment of the interest on the mortgage.

It was, perhaps, the intention of the widow to endeavor to keep such real estate for her minor children until they became of age by applying the proceeds arising from the rental of the property towards the satisfaction of the mortgage. However, she had, by her own fault or otherwise, made no deduction in the amount of this mortgage; taxes have accrued and expenses have occurred which would seem to require a further administration of the estate. The widow now asks that an administrator *de bonis non* be appointed, and that he be required to make an inventory of the remaining estate of said decedent. One of the admitted objects of this application is for the purpose of having such inventory made wherein the appraisers may set off to the widow and her minor children her statutory year's allowance. No particular objection is made to the appointment of an administrator *de bonis non*, but the order of appraisal and, incidentally thereto, the granting of the widow's allowance, is resisted. The filing of an inventory by an administrator *de bonis non* can be omitted unless in the opinion of the court it is necessary. Section 6023, Revised Stat.

It is claimed by the heirs that the widow by accepting the provisions of the will, as well as by her acquiescing in the resignation of the executor and taking the rental of property, has waived her right to a year's allowance. It is said that as her allowance could only be had by an appraisement, and the will directing there should be no such appraisement, she elected to take under the will, that thereby she agreed to and did waive claim to such year's allowance.

In the recent case of *Baker v. Baker*, 51 Ohio St., 217, it was held that the request that the executor should not be required to give bond is not an essential part of the will. The language of the court, on page 224, is applicable to the case at bar. Here it is said: "If nothing had been said as to the bond, the omission would not have rendered the will inoperative. And a request in the body of the will that an executor be not required to give bond, would be subject to the discretion of the court admitting the will to probate, which might grant letters testamentary with or without bond as it might deem expedient, and when granted without bond, the court might at any time subsequent, upon the application of any party interested, require a bond to be given."

Likewise in the case where the will requests that no appraisement be made, it is within the discretion of the court whether or not such request is followed, and therefore it occurs to me, it is really no part of the will. The section which provides for the widow's election likewise does not seem to require that this be considered a part of the will.

Section 5964 relating to this subject is as follows: "But such election by the widow or widower, to take under the will, shall not bar the

right to remain in the mansion house of the deceased consort, or receive one year's allowance for the support of herself and children as provided by law, unless the will shall expressly otherwise direct."

It is said that because the will gives the widow a life estate in the realty and all the personalty, and thereby she gets the income of all the property of the deceased, that this by necessary implication works a forfeiture of her claims to a year's allowance. In the face of the language of the section just quoted, it would seem that something received by necessary implication is not sufficient to bar her year's allowance. It must be an express direction. In the case of *Watt v. Watt*, 35 Ohio St., 480, a provision was made that the widow should use the income of all the property in supporting the children, and it was there held that her election to take under such will and using the property for that purpose did not bar her of her year's allowance. In explaining to the widow her rights under the will, and what she retained in the event she refused to take under the will, no court would have said to her that, if she elected to take under the will, she would lose her right to a year's allowance.

As to her waiving her year's allowance for so long a period, or being estopped by her acts in accepting the rents of the real estate and acquiescing in the estate being administered, there might be some question.

The statute does not seem to place a limit upon the time within which, where appraisers fail for any cause to assign the same, a demand must be made for such allowance. It is probable that where an estate is fully settled, all debts presented paid, the administrator discharged with the knowledge of the widow, that it would be held that she could not come into court and have an administrator *de bonis non* appointed for the sole purpose of securing a year's allowance. But even in such a case, where there are minor children, there might be questions as to her power to waive the same.

In *In re Hough* in this court, it was held that where a widow had minor children, she could not waive her right or that of the children to a year's allowance by an ante-nuptial contract to that effect. But so long as the estate is in process of administration, it seems to me that there can be but little doubt. That in case where no allowance has been made to the widow and her minor children, they may come into court at any time and insist upon the executor or administrator discharging his duty in that respect. Especially is this true when no inventory of the estate was ever made. If any inventory had been made, and the appraisers failed to set apart such allowance, if such allowance was a part of the inventory, exceptions thereto might be filed within one year from the date of the return, as provided in sec. 6024. But it is very doubtful whether this is a part of the inventory, for by sec. 6042, it must be in a separate schedule, signed by the appraisers, and returned with the inventory. And it is further provided that if a review of this allowance is sought by an interested person, it must be by petition. Section 6043.

Under our statute, the widow is not required to make a demand to have a year's allowance set off to her. It is the duty of an administrator to have an inventory made, and of the appraisers therein to set apart such year's allowance. Section 6040.

The widow and children, therefore, not being required to make a demand to secure such allowance, mere lapse of time could not be considered as a waiver or a relinquishment of such right.

In re Estate of Rierdon.

In a case in Mississippi where it was held that a year's provision is a claim which must be asserted by the widow, or by the children if there is no widow living, before it can be authorized by the court, even where such is the case, it was held that the time for asserting the claim not having been limited by statute to the year succeeding the decedent's death, or to any particular time, it is a claim demandable at any period before the final settlement of the estate. *McNulty v. Lewis*, 8 Smed & M. 526. So in New York it was held that if, on taking the inventory, the property directed to be set apart to minor children was not apporportioned, the error may be corrected on final accounting. *Clayton v. Wardele*, 2d Bradf., 7.

Section 6040 provides, that if the widow or such children have, since the death of the deceased, and previous to such allowance, consumed for their support any portion of the estate, the appraisers shall take the same into consideration in determining the amount of the allowance.

This rule was also applied in the case of *Watts v. Watts*, 38 Ohio St., 480, and should be followed by the appraisers making the inventory, which will be ordered in this case. The matter as to homestead rights, etc., can more properly be passed upon in the petition which I presume will be filed hereafter to sell the real estate of the decedent.

James Knight and Oscar T. Martin, for widow.

A. H. Gillett for estate.

ASSIGNEE'S SALE OF MORTGAGED PREMISES.

[Clark Probate Court.]

J. W. KEIFER, ASSIGNEE, V. GEORGE SPENCE ET AL.

1. In a proceeding by an assignee for creditors, to sell the real estate assigned, the court has power upon the cross-petition of a defendant mortgagee to grant such defendant affirmative relief and order the assignee to sell the property in the mortgage described and apply the proceeds therein.
2. Foreclosure is nothing more or less than the extinction of the mortgagor's equity of redemption by the sale of the premises, and the application of the proceeds to the payment of the mortgagee's claims. This, secs. 6350 and 6351, Rev. Stat., both provide may be done in the probate court in assignment matters.

ROCKEL, J.

In June, 1888, George Spence made an assignment of all his property to J. Warren Keifer in trust for the benefit of his creditors. The estate was quite a large one, consisting of lots and lands in the city of Springfield, in various counties in the state of Ohio and in other states of the Union. A number of persons held mortgages and other liens upon various different tracts, some being first mortgage liens and others second mortgage liens and judgments. In July, 1888, the assignee commenced a civil action in this court and filed his petition herein, making the wife of the assignor and all the lienholders parties defendant. In September, 1888, E. Jane Spence, the wife, filed her answer and consented to the sale of said premises free of her dower interest therein, and that the value of her dower be allowed to her out of the sales. On the

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same day that Mrs. Spence filed her answer the assignee took an order to sell, either at public or private sale, all such real estate, free of Mrs. Spence's dower, on the terms of one-third cash, one-third in one year and one-third in two years from date of sale, etc. All questions arising out of liens in said real estate were reserved for the future consideration of the court. None of the lienholders at that time filed any pleadings to assert their lien on any specific part of the assigned property. The assignee, some at private, some at public sale, sold a large amount of the property, and distributed the same under the orders of this court to the various parties entitled. But a considerable portion remains yet undisposed of.

On November 14, 1891, Mary Keifer filed a cross-petition, in which she alleged that she had been made a party defendant and that the assignor and his wife were indebted to her in the sum of \$—— secured upon a certain described real estate by mortgage, and that the conditions of the mortgage had been broken and the same had become absolute.

This cross-petition further alleged that since said assignment the property in her mortgage described had been twice appraised and four times offered at public auction, by the assignee, and that the assignee had also endeavored to sell the same at private sale, but without success.

And that said appraisements were both largely in excess of the actual selling value of said real estate, and that the same cannot be sold in any reasonable time.

She therefore prayed that the said real estate "be immediately re-appraised under an order of this court; that said assignee may be ordered to proceed forthwith to advertise and sell the same, under said re-appraisement so to be made, according to law, and apply the proceeds of such sale to the payment of this cross-petitioner's said claim; and that she may have such other relief as the nature of the case may require."

The assignee entered his appearance in writing to this cross-petition. The same was set down for hearing; and on the day of such hearing, the cross-petitioner, Mary Keifer, by her attorney, George Arthur; the wife, E. Jane Spence, by J. Mower, her attorney, and the assignee in person were present. On the hearing nothing much was said in reference to the nature of the relief asked for in the cross-petition, although the cross-petition was read by Mr. Arthur. The matter was principally argued upon the advisability of a re-appraisement. The matter was taken under advisement by the court, and after some weeks had elapsed, Gen. Keifer was informed that on the seventh of March the court would grant Mr. Arthur, the attorney of Mrs. Keifer, an order in the matter. The court also informed Mr. Arthur of this fact and requested him to prepare the entry. On March 1st, Mr. Arthur appeared and presented the entry, of which he said he notified Gen. Keifer, having been at his office, and he not being in, Gen. Keifer, nor no one else making any objection, the entry was journalized and an order was granted. The entry referred to is as follows:

"This day came J. Warren Keifer, assignee of George Spence, in person, and said Mary E. Keifer, by George Arthur, her attorney, and the said E. Jane Spence, by J. K. Mower, her attorney, and thereupon this cause came on to be heard upon the cross-petition of said Mary E. Keifer, herein, and upon the exhibits and testimony, and the same was argued by counsel. On consideration whereof the court finds that all of the statements contained in said cross-petition are true; that there

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is still due and unpaid to said Mary E. Keifer on the note mentioned in said cross-petition with interest computed to date the sum of six thousand and eight hundred and seventy-one dollars and sixty-three cents (\$6,871.63); that the mortgage made by said George Spence and E. Jane Spence on the real estate described in said cross-petition is the first and only lien on said real estate, except the taxes, and that the said Mary E. Keifer is entitled to the relief prayed for in her said cross-petition. It is therefore ordered, adjudged and decreed by the court that said J. Warren Keifer, as assignee of said George Spence, proceed forthwith to cause the real estate described in said Mary E. Keifer's cross-petition herein to be re-appraised by * * * according to law, that he thereupon, without delay, cause said real estate to be advertised and sold according to law, and apply the proceeds of such sale to the payment of said Mary E. Keifer's said claim, and said assignee is ordered to make return of his proceedings as soon as said sale is made."

Motion is now made that this order be set aside for the reasons:

1st. That such order was irregularly made in the absence and without the knowledge or consent of plaintiff herein, or other party to this proceeding, save Mary E. Keifer.

2d. This court has no jurisdiction to make such an order and the same is void.

3rd. This court has no jurisdiction of the necessary parties to authorize it to make any finding or order on said cross-petition of the kind prayed therein, or of any kind.

As to the first and third reasons assigned for setting aside this journal order it is sufficient to say that the assignee who represents the assignor and his creditors, having entered his appearance to this cross-petition and appeared in court at the time of its hearing, and that E. Jane Spence, wife of said assignor, who with this cross-petitioner, represented all the parties in interest, having also appeared by her attorney, and from the further fact that all terms in interest were made parties defendant by the assignee in his petition herein, and all were properly brought into court, and the said E. Jane Spence, the only other person, outside of general creditors, having any claim or lien on the premises in the cross-petition described, having filed an answer herein, this court has certainly acquired jurisdiction of all necessary or even proper parties to make any order otherwise authorized by law to make in the premises. There is no want of jurisdiction over the persons of the parties in interest herein.

2. Whether the court has jurisdiction to make the order in question, has never been decided in an Ohio court to our knowledge. It is contended by the assignee, that the granting of the order is the exercise of a chancery power only authorized in courts of general equity jurisdiction, and that this court is not one of general equity jurisdiction. And further that it is a special proceeding and authorizes an order of sale to be made only upon the application or petition of the assignee, and not upon any cross-petition. It is conceded that the constitution authorizes the legislature to grant power to the probate court, over the matter in issue. The question then is has the legislature conferred this power?

The object and purpose of all assignment laws is the speedy conversion of all the assets of the assignor into money, and an equitable distribution to all the creditors. It does not contemplate the taking away of any right of any creditor, except such as will result to the general good of all, and do him no harm. By virtue of this equitable doctrine,

creditors are required to present their claims to the assignee and receive payment in the due administration of the estate. An examination of the assignment law from the time of its first enactment in 1859 (56 O. L., 28), to the present, with a single exception, shows a constant enlargement of the powers of the probate court, and a seeming intention to confer ample jurisdiction to do everything necessary to render complete justice to all interested parties.

The single exception is the act of 1861 (58 O. L., 106), which permitted, but did not direct the assignee that where the real estate was encumbered by liens, to file his petition for the sale of the same, in the court of common pleas, etc. But this act did not curtail the jurisdiction of the probate court, it only enlarged that of the common pleas.

"This provision was made," says Judge Okey in *Lindemann v. Ingham*, 36 Ohio St., 12, "because of the complex questions which are some times presented in regard to liens on the real estate, embracing as they do questions as to liens by mortgage and judgment liens by execution foreign and domestic, vendor's liens, mechanic's lien, liens of occupying claimants and others. But even questions of this character may be determined in the probate court."

The intent of the legislature to confer ample jurisdiction in assignment matters to the probate court, to work out the equities of all interested parties, is found also from the fact that where such power is decided to be wanting, it passes an act conferring the lacking power. Thus, when the Supreme Court in *Dwyer v. Garlough*, 31 Ohio St., 159, decided that the assignee could not extinguish, by sale, the contingent right of dower of the wife of the assignor, in the assigned property, the legislature passed an act (77 O. L., 189), granting such power. The case of *Dwyer v. Garlough* also sustains the proposition that where complete relief can not be granted in the probate court to a mortgagee he may bring his action in the court of common pleas, notwithstanding the assignment.

But it also recognizes the doctrine that if the probate court can give complete relief to the mortgagee, and its action has been invoked, that it then has exclusive jurisdiction.

The case of *Gilliland v. Sellers*, 2 Ohio St., 223, deciding that a decree of a probate court, involving exercise of the general jurisdiction of a court of equity, must be considered as *coram non jure* and void, is said by Judge Cox, in *Sayler v. Simpson*, 1 Circ. Dec., 370, to be virtually overruled by *Lindemann v. Ingham*, 36 Ohio St., 1, and in the same case in the Supreme Court, Judge Williams says he does not perceive wherein it is in conflict with *Lindemann v. Ingham*, therefore it would have no bearing in the present case.

The case of *Lindemann v. Ingham*, is an important and well considered case (Judge Williams in *Sayler v. Simpson*, 45 O. S., 151). In that case *Ingham & Brother*, having a chattel mortgage on property which had been assigned to *Lindemann*, demanded possession of the property covered by this mortgage, which was refused by the assignee, who proceeded under the assignment laws to sell them and convert them into money. *Ingham & Bro.* then commenced an action against *Lindemann* to recover damages for the alleged wrongful conversion of the property by said assignee in the common pleas court of Hamilton county. In an answer the assignee set up the fact of his appointment by the probate court which has exclusive jurisdiction in such cases, and denied that he was answerable to the plaintiffs in the cause. *Ingham*

& Bro. demurred to this defense which was sustained by the common pleas court. The case was taken on error to the district court and reserved to the Supreme Court, where the decision of the common pleas was reversed, holding that the probate court had ample jurisdiction in the matter, and that it was the duty of the assignee to sell the property, notwithstanding any objections of the mortgagees, and rights of the mortgagees and the creditors must be worked out in the proceeding in the probate court. After referring to the various statutory enactments, the court says: "These provisions very clearly show that the legislature intended to vest in the probate court full and complete jurisdiction over the whole subject of assignment of this character."

Saylor v. Simpson, 45 O. S., 141, is the most recent decision of the Supreme Court upon the jurisdiction of the probate court in matters of assignment.

This was also a chattel mortgage case. Saylor, the assignee, proceeded in the execution of his trust and converted the assets into money. The holders of the chattel mortgages then filed their applications in the probate court for an order directing the assignee, out of the proceeds, to pay the amount due on their mortgages. Certain creditors raised the question that the probate court had no jurisdiction to hear the application. The probate court held that it had such jurisdiction. The matter was taken by appeal to the common pleas court, and there it was adjudged that the probate court had no jurisdiction and the order was void. The common pleas judge in rendering his opinion says, 9 Dec. Re., 687: "Upon an examination of the authorities I am of the opinion that the probate court did not have jurisdiction to determine, either the amount of the claims or the validity of the mortgages given. There was clearly an issue made in equity as to the validity of the mortgages, whether they were part and parcel of the assignment transaction, and in fraud of the rights of the general creditors. The power to try that issue has not been given to the probate court." Thus we see, from this opinion, that it was a clear test of the equity powers of the probate court. From the common pleas court the case was taken to the circuit court, 2 Circ. Dec., 370, where the decision of the common pleas was reversed and the probate court sustained. In the decision there the court says: "The statute provides (sec. 6351), that the court shall order the payment of all incumbrances and liens on all the property according to priority. Now the term priority has a very comprehensive meaning in this case. The court is to order payment of lien and incumbrances according to priority. That involves the consideration of quite a number of questions. In the first place, whether there is a lien is a question that the probate court is to decide. That might involve questions of law and questions of equity, and yet the probate court must decide that, and according to priority. If the debt is not a lien; if it is not an incumbrance; if it has no legal existence as either, then certainly there can be no priority, because it does not exist, and the court, in order to ascertain whether there is a priority, must determine whether there is an existing thing that can have a priority; and that involves, as I said before, both law and equity principles in its decision."

From this court the case was taken on error to the Supreme Court (45 Ohio St., 141, full brief of counsel also here given). And the decisions of the probate and circuit courts were sustained. In the opinion there rendered Judge Williams says: "The several provisions of the statute relating to assignments by insolvent debtors, and proceedings thereun-

Clark Probate Court.

der, adequately endow probate courts with jurisdiction to order sale of the assigned property, and the payment of all incumbrances and liens thereon, by the assignee out of the proceeds according to their priority, and they may, in the exercise of such jurisdiction, decide upon the validity of such liens, and determine to what extent and in what order they are entitled to be so paid."

While the decision in this case related to a chattel mortgage, the court considered both sec. 6150 and 6151, and its reasoning shows no distinction between the powers of the court in relation to a chattel and a real estate mortgage.

In reference to the decision of *Dwyer v. Garlough* it is said: "This principle [that is, where courts have concurrent jurisdiction, the one first acquiring jurisdiction retains the matter to the exclusion of the other] was fully recognized in *Dwyer v. Garlough*, 31 Ohio St., 158, but was denied application in the case solely on the ground that under the statute then in force, no authority was given the probate court to cause the wife's dower interest in the land to be sold, but only the property assigned, which did not include her interest; while by the terms of the mortgage the mortgagee was entitled to have it as well as the husband's estate sold; and the remedy then afforded by the sale in the probate court was therefore inadequate. It is apparent that the amendment referred to was made to supply this defect, and to remove the objection to their exclusive jurisdiction in such cases. Whether the object is fully accomplished is not a question now before us; but certainly the amendment is indicative of a legislative intent to repose in probate courts ample power to effectuate a speedy and complete administration of such trusts."

At the time this decision was rendered the statute did not provide specially that the assignee might commence a civil action in the probate court, to have all liens, etc., determined. Such right was then confined to the common pleas exclusively. Since then, as a further mark of the legislative intent in such matters, this right has been conferred upon the probate court by the act of May 18, 1886, 83 O. L., 236.

It is now provided, "that the assignee may, in all cases, where the real estate to be sold, or which has been contracted to be sold by the assignor prior to the assignment, is incumbered with liens, or where any questions in regard to title, or dower estate of the wife or widow of assignor, require a decree to settle the same, commence a civil action therefor in the common pleas court or probate court of the proper county, making all persons in interest, including the wife or widow of the assignor, parties to such proceeding, and upon hearing, the court shall order a sale of the premises, or the completion of the contracts of sale so made by the assignor, the payment of the incumbrances, and the contingent dower interest of the wife or widow subject to the proviso hereinafter contained and determine the question in regard to the title of the same; and the proceeds of the real estate so sold, the payment of the liens and incumbrances, and the contingent dower interest of the wife or widow as ordered by the court, shall be reported to the probate court by the assignee and disposed of as provided in this chapter." The language of this and the preceding sections shows conclusively to my mind that it was the intent of the legislature to confer full, ample and complete jurisdiction upon the probate court to determine all questions, either equitable or legal, that are necessary to do equity and justice to all parties in interest and secure the proper and just administration of

the trust. In fact, in all matters connected with the administration of such a trust, equitable rather than legal principles are applied.

But the language of this section strongly suggests that the action in this court in this cause is an equitable, rather than a legal action. "Commence a civil action." Now the term civil action in this as well as all code states embraces actions of both a legal and an equitable nature, and as probate courts are so constituted not to give relief on legal actions, it must mean as here used an equitable action. In the original act giving this jurisdiction to common pleas courts the language used was "filing his petition," instead of to "commence a civil action." He must make "all persons in interest, parties to the proceeding." The object and purpose of this provision is not alone that the assignee may give the purchaser a title clear of these liens, for this is provided for in sec. 6350, where it is said: "Deeds shall be made of the real estate to the purchasers, conveying the title free from all liens on the same, for all debts due by the assignor."

But it is rather for the purpose of compelling "all parties in interest" to set up their claims, either by cross-petition or otherwise, and have them adjudicated for the protection of the assignee. The assignee having thus invoked the jurisdiction of the court and brought the mortgagee or other interested party within that jurisdiction, it would be the duty of such mortgagee to file a pleading setting forth his cause of action, and equally well the duty of the court to grant him the relief to which such cause of action showed him entitled. With every mortgage there exists an inherent right of foreclosure. Foreclosure is nothing more nor less than the extinction of the mortgagor's equity of exemption by the sale of the premises, and the application of the proceeds to the payment of the mortgage claim. This, secs. 6350 and 6851 both provide may be done in the probate court in assignment matters.

It is what the mortgagor agreed and contemplated should be done when he made his deed of assignment. Without such power the assignment would prove ineffectual. A reservation of it would be a fraud.

I am of the opinion that this may be done on the cross-petition of a defendant.

For by the assignment and the bringing of the action by the assignee in this court the mortgagee is deprived of that right in any other proceeding or court.

But the order granted in the case at bar rests not alone upon the facts set up in the cross-petition arising out of the mortgage of the defendant but upon the failure of the assignee to "at once convert all the assets by him received into money" as directed by law, and to sell the real estate therein described although twice appraised and four times offered.

The cross-petition seems to recognize that a former order of sale had been granted and seeks to modify it with a reappraisal and the enforcement of a prompt execution of sale immediately thereafter.

The cross-petition does not ask for an appraisement, but a reappraisement; and sufficient reasons are alleged to grant the same.

A finding of the amount due on the mortgage is asked in the cross-petition and made in the order. This is proper. Section 6351 seems to contemplate that such order may be made before the sale of the premises as well as after such sale. Such is the practice in this court. Indeed, the assignee seemed to recognize it in this case when he made provision in his entry of sale on his petition that: "All questions aris-

ing in this case, and especially questions growing out of liens, priority of liens, and on distribution, are reserved for the further and final order of the court." The original order of sale in this case was not based upon anything more than the application of the assignee to sell and the finding that all the defendants had entered their appearance in writing, and that Mrs. Spence had by answer waived her contingent right of dower in the real estate, etc. The right of no one was adjudicated or passed upon, excepting Mrs. Spence's; and the order of sale with this exception conferred no greater authority of sale upon the assignee than he already possessed.

The only effect it would have had was that if the order had been executed and the real estate sold, the claims of the lienholders would be transferred from the real estate to the fund arising from the sale, and they would be estopped from asserting any lien as against the premises. The claim of the lienholder on the property is not entirely extinguished until the premises are sold and confirmed by the court in any proceeding by the assignee.

Until the claim of the lienholder has been the subject of a proper hearing in a court of competent jurisdiction, or the assignee has converted the property upon which the lien exists into money, I am of the opinion the claimant may come into this court either by an original application or by way of cross-petition, where he has already been made a party, set up his cause of action, and this court should give him the relief to which he is entitled. If he shows, as the cross-petition in this case does, that for almost four years the assignee has failed to sell the property and apply it on the mortgage, he has a right that this court direct the assignee to proceed in the execution of his trust, and sell said property and apply the proceeds on his mortgage.

This order in such a case rests not alone on the mortgage claim, but upon the failure of the assignee to execute his trust. Section 524, Rev. Stat., gives this court exclusive jurisdiction "to control the conduct of the assignee," and if the court in this case, upon the cross-petitioner's application, would order the assignee to proceed in the execution of his trust, the order would be substantially the same as that made in the entry and order to which objection is made by the motion now under consideration. What the court can do indirectly it can do directly.

The cross-petitioner, as creditor of the assignor, is entitled to have the assignee proceed to sell the premises in the execution of his trust; as mortgage lienholder she is entitled to have this specific tract sold and the proceeds applied on her mortgage debt. If there was any previous order made in the court in the assignment that conflicts with this order or entry, so far as the same is in conflict therewith, it is set aside without any special order to that effect.

As an assignee is, by law, enjoined to at once convert all the property assigned into assets, and that he can sell the real estate without any order of court directing him so to do, if the assignee should make a sale of the premises under any order of this court and the sale be confirmed by the court there could be no question as to the validity of the title. The only deed that the assignee can make, the one which the law directs shall be ordered made when the sale is confirmed, is one "conveying the title free from all liens on the same for all debts due by the assignor." The wife having filed her answer waiving her claim of dower, I have no doubt that a sale made by the assignee under an order as directed by the entry in question, as good a title would be conveyed as the assignee in

Keifer v. Spence et al.

any case could make. As the entry provides for a cash sale, and it might be to the interest of the general creditors, and work no substantial harm to this cross-petitioner, the entry is so modified that the terms of sale be $\frac{1}{3}$ cash on day of sale, $\frac{1}{3}$ in one year and $\frac{1}{3}$ in two years, with interest on deferred payments to be secured by mortgage on the premises; otherwise the motion to set aside the entry will be overruled.

Keifer & Keifer, for assignee.

George Arthur, for Mary E. Keifer.

BURGLARY AND LARCENY.

[Summit Common Pleas, September term, 1895.]

STATE OF OHIO V. GEORGE LONG.

1. If a door is locked, or fastened by a cleat, with hasp and staple, and sealed, the force sufficient to break off the cleat and remove the seal and other fastenings, constitutes sufficient force to meet the requirements of the statute relating to burglary and larceny.
2. If a door is partially open, and the only force used was to further open the door, push it upon slides or upon such other device as was used in hanging the door, that would not constitute a forcible breaking in the sense the statute uses the term.
3. An allegation in an indictment charging the property stolen to be the property of a railroad company is sufficiently proved if the evidence establishes the fact that the property was rightfully in the custody of the railroad company as a common carrier, though it was in fact the property of a shipper.
4. No grievance committed by a railroad company upon accused, or the rights of accused, can justify his committing a theft upon the railroad company.

CHARGE TO JURY.

VORIS, J.

The contention in this case has been over the alleged fact and issue taken thereon, that the car was forcibly broken into and entered, and that the taking of these oats was not with intent to steal. Those are really the two facts over which counsel have contended throughout this trial, and I will not undertake to instruct you upon the other elements that are essential to make up the crime of burglary, unless counsel desire me to do so. Does the defense desire that I should define the offense any further, than it relates to the two facts I have just stated?

Mr. Sanford: No, sir, because it is conceded the property was taken.

The Court: By the statute, the breaking and entering must have been committed in the night season, and there must be a forcible breaking and entry into the railroad car. It must be accompanied with the specific intent to steal the property of some value therefrom, and that the defendant is guilty of the offense charged. The breaking into must have been in the night season. We define what is understood in law by night season, as follows: Night season consists of the period of time from the termination of daylight in the evening to the earliest dawn in the morning.

The condition of forcible breaking is this, there must be a forcible breaking, and this breaking must precede the entry complained of. The statute requires that the breaking must be forcible, but it does not define

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the degree of force requisite to constitute the crime. We say to you that if the door was locked, or door fastened by a cleat, with hasp and staple, sealed, by such device as has been exhibited to you in evidence, the force sufficient to break off the cleat and remove the seal and other fastenings would constitute sufficient force to meet the requirements of the statute.

The real question submitted to you for your determination and over which the contest has been mainly had, is: did the accused forcibly break into that car? Did he remove the fastenings by which the door was closed and thereby break into and enter said car? This is a practical matter of fact that you are to determine in the light of the evidence submitted to you.

The defendant upon the stand admitted that he took from this car about sixty bushels of oats therein contained, but he says that he did not do this with the intention to steal the same.

If the defendant unlawfully, wrongfully and with a fraudulent intent, took these oats out of and from this car, without the consent of the owner, and with intent to permanently deprive the owner thereof, then we say to you that no matter what his excuse was for taking these oats, it would constitute the larceny charged in this indictment.

No grievance committed by the railroad company upon the accused, or the rights of the accused, can lay any justification for his committing a theft upon the railroad company.

As to the question whether the car door was open or closed at the time of the taking, is a matter of fact for you to determine from the evidence. If the door was partially open, and the only force that was used by the accused was to further open that door, push it upon slides, or upon such other device as was used in hanging the door or doors that were open, that would not constitute a forcible breaking in the sense the statute uses the term; but if you should find the door closed in the manner that we have described, either fastened by a cleat, by staples and hasp, and sealed with such a device as has been exhibited to you, or fastened by either of these modes, the force requisite to break, or remove them, so as to enable the party to open the door, and he did, by that means, open the door and get access into the car, that would constitute such forcible breaking as would bring the party within the penal provisions of this statute.

If the evidence convinces you that the car was fastened by such cleat, staples and hasp, and sealed on or about 4 o'clock on the afternoon before the night of the burglary, you may presume that this condition of the door continued until the evidence convinces you to the contrary.

And we also further say to you, if the door was wholly closed at any of the time of taking of these oats from the car, no matter by whom closed, if you find from the evidence that the door was actually closed, and that to make a re-entry into the car it was essential to use substantial force to open that door, the force requisite to open it, for the second entry, would constitute a burglary under the statute, if the other conditions of our charge are found to exist.

The indictment charges the property stolen to be the property of the C., A. & C. R. R. Co. We say to you, that this allegation of the indictment will be sufficiently proved, if the evidence establishes the fact that the property alleged to have been stolen, was rightfully in the custody of the railroad company as a common carrier, though the property in fact was the property of the shipper.

ALIENATION OF AFFECTIONS—LIVING IN ADULTERY.

[Stark Common Pleas, 1896]

WM. O. MYERS V. CHAS. RAYNOLDS.

1. Where a husband knowingly, although only passively, suffers, permits or connives at the improper advances, attentions and presents from another man to his wife, and at their improper relations, he cannot recover for alienation of his wife's affections.
2. In this connection the jury may take into consideration the extent to which the husband had knowledge of what took place between his wife and defendant, what trips he accompanied them upon, and how often, if at all, he invited defendant to his house, what presents he knew of his wife receiving from defendant, and how far he permitted and encouraged all these things.
3. In determining whether the husband has, from the time of his marriage until the separation of his wife from him, on the ground of alienation of her affection, lived a chaste, virtuous life himself, and in all respects treated his wife as an affectionate, kind and loving husband should, the jury may take into consideration the situation and circumstances in life of the parties, the family, the surroundings and the home.
4. And in estimating the damages the jury must regard the character of the injury, the alienation of the love and affection of the wife, her debauchment, if such took place, and give damages to compensate the husband for the loss of her love and society and also for all that he may feel from the nature of the injury.
5. The jury also has a right to give what is called exemplary or punitive damages in such sum as may be deemed a punishment for defendant's conduct, and which will be an example, for the purpose of deterring others from like conduct.
6. In an action for having lived and cohabited in a state of adultery with plaintiff's wife—there is no fixed rule for determining the amount of damages to be allowed. It must be determined under all the facts and circumstances by the judgment of the jury, and in determining the question the social relations of the parties, the apparent affection that existed between the husband and wife before the time the defendant is alleged to have begun his improper conduct, and the actual misconduct of the defendant, should be considered.

MCCARTY, J.

Gentlemen of the jury: This is the case of Wm. O. Myers v. Charles Raynolds, brought for the purpose of recovering from said Raynolds, damages for the alleged alienation of the affections of the wife of the plaintiff, and also for damages alleged to have grown out of the living and cohabiting together in a state of adultery in the city of Chicago, by said Raynolds with the wife of the plaintiff.

The plaintiff sets forth his first cause of action in his amended petition in the following language: That on or about April 2, 1868, he was married to one Charlotte M. Myers, and ever since said date Charlotte M. Myers and this plaintiff have continued to be husband and wife; that prior to the injuries hereinafter complained of, said Charlotte M. Myers and the plaintiff lived happily together as husband and wife, and but for said injuries, would still continue to do so; that in said relation, prior to said injuries, the plaintiff had the affection, society and services of said Charlotte M. Myers, and but for said injuries would continue to do so; and that for more than two years prior to the — day of August, 1893, the defendant, for the purpose and in order to deprive the plaintiff of the affection, society and services of his said wife, at numerous times visited said wife, gave her presents, induced her to avoid the society of the plaintiff, and to continue in the society of the defendant, fondled, caressed and kissed said wife, obtained her affection and caused the plaintiff to lose the affection of his said wife.

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That the plaintiff for want of knowledge, cannot more fully state the dates and details of said transactions, but he alleges that the same were continuous and of the character aforesaid.

That said Charlotte M. Myers, from the time of said marriage up to the — day of August, 1893, resided with the plaintiff as his wife, and on said day the defendant, with the intent and purpose of depriving the plaintiff of the affection, society and services of said Charlotte M. Myers, persuaded, enticed and induced her to depart from the plaintiff and their home in Canton, Ohio, and without the consent of the plaintiff, and contrary to his desires, to go to the city of Chicago, in the state of Illinois, and to live with said defendant. That since said date said Charlotte M. Myers, induced thereby, has remained away from the plaintiff and his home, and has continued to live in the city of Chicago with the defendant, and still continues so to do; that during said time the defendant has supported and maintained said Charlotte M. Myers, has had her society and services, and has excluded the plaintiff therefrom, and still continues so to do; that by reason thereof the defendant wrongfully obtained the affection of said Charlotte M. Myers, and has caused the plaintiff to lose the same, and still continues so to do. That said wrongful transactions were without the consent of the plaintiff; that the plaintiff has done nothing to cause said Charlotte M. Myers to leave her said home and himself, but has ever conducted himself toward her as a faithful husband; that by reason of the wrongful acts aforesaid, the plaintiff has been damaged by the defendant in the sum of ten thousand (\$10,000) dollars.

For his second cause of action, the plaintiff says that he adopts all of the allegations contained in his first cause of action and makes the same a part hereof as if repeated herein, and further says: That after enticing away the plaintiff's said wife, Charlotte M. Myers, as set forth in said first cause of action, and that ever since the said — day of August, 1893, the defendant and said Charlotte M. Myers, without the consent of the plaintiff, have been living and cohabiting together in a state of adultery in said city of Chicago, and still are so doing, with knowledge on the part of defendant that said Charlotte M. Myers is and was the wife of the plaintiff; that thereby the plaintiff has been damaged by the defendant in the sum of ten thousand (\$10,000) dollars.

Wherefore the plaintiff claims judgment against the defendant for his damages so sustained, in the sum of twenty thousand (\$20,000) dollars.

To this amended petition, the defendant has interposed his answer, which is as follows: And now comes the defendant, Charles A. Reynolds, and for answer to the amended petition of the plaintiff filed herein, says he admits that said William O. Myers and Charlotte M. Myers were husband and wife; but he denies each and every other allegation contained in the causes of action set forth in said plaintiff's petition, and he prays to be hence dismissed with his costs.

These pleadings, the amended petition of the plaintiff, and the defendant's answer thereto, form the issues to be determined by you in this action. You will have these papers with you in your jury room, and can read them in detail. The issues are the matters in dispute.

What is set forth by the plaintiff in his petition, and admitted by the answer you will take as true.

The answer admits that the plaintiff, William O. Myers, and Charlotte M. Myers were husband and wife.

Myers v. Raynolds.

You will observe that the plaintiff has stated two causes of action in his petition, which are in brief, first, that the defendant by wrongful conduct on his part obtained the affection of the plaintiff's wife and caused the plaintiff to lose her affections; that on the — of August, 1893, the defendant enticed and induced her to depart from plaintiff's home in Canton, Ohio, and go to the city of Chicago, and live with him, the defendant, and that she has ever since and still continues to live with defendant in the city of Chicago.

The second cause of action states in substance that after enticing the plaintiff's wife to go with defendant to Chicago, that the said Charlotte M. Myers and the defendant have been since the — day of August, 1893, living together in a state of adultery in the city of Chicago.

This alleged alienation of the affections of Mrs. Myers from her husband in the first cause of action, and the adulterous relation alleged in the second cause of action are denied in the answer.

The defendant, through his counsel, has admitted on the trial that he, the defendant, made many visits to the plaintiff's home, that he went with the plaintiff's wife and other members of his family on a number of trips up the lakes and to several cities.

To entitle the plaintiff to recover on the first cause of action he must establish by a preponderance of the testimony the averments contained in his said first cause of action, viz., that by the wrongful conduct of the defendant, Charles Raynolds, he alienated the affections of the wife of the plaintiff from him, the plaintiff, and that before the — day of August, 1893, the defendant for the purpose, and in order to deprive the plaintiff of the affections, society and services of his wife, visited the wife, gave her presents, induced her to avoid the society of the plaintiff, and to continue in the society of the defendant, and so conducted himself toward the plaintiff's wife as that he obtained her affection, and caused the plaintiff to lose the affection of his wife; and that on or about the — day of August, 1893, with the intent and purpose of depriving the plaintiff of the affection, society and services of Mrs. Myers, induced her to depart from the plaintiff, without the consent of the plaintiff and contrary to his desire, and go to the city of Chicago, in the state of Illinois, and there live with the defendant.

And to entitle the plaintiff to recover on his second cause of action stated in the petition, he must establish by a preponderance of the testimony that since the — day of August, 1893, the defendant and Charlotte M. Myers, without the consent of the plaintiff, have been living and cohabiting together in a state of adultery in said city of Chicago, and are still so doing.

If the plaintiff has established the facts averred in his first or second cause of action, or both, he will be entitled to recover damages against the defendant in such sum as will make him whole for the loss he has sustained, not exceeding the amount stated in such cause or causes of action, in the petition.

Testimony has been admitted tending to show the social and family relations existing between the plaintiff's family and the defendant, and tending to show that the defendant requested the privilege of calling the plaintiff's wife his "Sister," and that the plaintiff's children called him "Uncle," and tending to show that many trips were made and the plaintiff and plaintiff's family and defendant went along, with the knowledge and consent of the plaintiff: and also tending to show that on some occasions the plaintiff objected to defendant's frequent visits at his house,

Stark Common Pleas.

The plaintiff's first cause of action in this case is based upon the alleged loss of the affection of his wife by means of the improper conduct of the defendant which resulted in the alienation of the affections of the wife of said plaintiff, so that on or about August, 1893, said defendant persuaded, enticed and induced the wife of the plaintiff to depart from his home in Canton, Ohio, and to go to the city of Chicago to live with defendant, and that since said time said wife has remained away from the plaintiff, and he has thereby lost her love, affection and society, to his damage.

There is no charge in this cause of action that the defendant and the plaintiff's said wife were guilty of any sexual intercourse or any other impropriety of conduct, except as therein charged and you can give no damages to the plaintiff on account of any such supposed grievance, and can give no damages under this cause of action unless you find by the weight of the testimony that said defendant did thus alienate the affections of the plaintiff's wife, and thus improperly induce her to depart his home and live with the defendant in Chicago, and the burden of proof is upon the plaintiff to establish this proposition by the weight of the testimony.

It is claimed on the part of the defendant that the plaintiff's wife did not leave home because of any seduction or improper influence upon his part, but because of the failure of the plaintiff to properly care for his said wife, and that she left home and went to Chicago with the knowledge and acquiescence of the plaintiff to prosecute her business of art decorating in said city, and before you can find for the plaintiff, because of any supposed injury in the separation of his wife from him, you must find that such reparation was caused by the defendant, in the manner charged in the first cause of action, therefore, before you can render a verdict in favor of the plaintiff for any amount for the alienation of the affections of his wife you must find that she separated from him on the ground of such alienation of her love and affection, and because of said improper conduct of the defendant. If you find that she separated from him for other causes, as claimed by the defendant, then there can be no recovery upon that ground in this action.

If you find from the testimony that the plaintiff's wife went to Chicago with the consent of her husband, and there entered into the business of art decorating with his acquiescence or consent, either directly or indirectly, then he could not recover any damages for such separation to which he has himself consented; unless you shall find that the defendant and plaintiff's wife lived together in a state of adultery, as stated in the second cause of action.

It is a maxim of the law that, that to which a man consents cannot be considered an injury to him. If therefore you find that the plaintiff knowingly, although it may have been only passively done, suffered, permitted or connived at the alleged improper advances, attentions and presents from the defendant to his wife, and at their alleged improper relations so far as the same is charged in the petition, your verdict must be for the defendant, notwithstanding you might be satisfied that the defendant by means of the conduct charged, had alienated the love and affection of the plaintiff's wife. The law will not tolerate a husband passively or actively conniving at his wife's conduct with another, and then aid him in recovering damages for that to which, by his conduct, he has consented. If the law would so permit, such men might seek to use their wives for the purpose of laying a foundation for damages, and to make money out of their

Myers v. Reynolds.

alleged misconduct. Therefore, whatever you may find to have been the relations between the plaintiff's wife and the defendant, if you find that such relations were consented to, or knowingly permitted, suffered or connived at by the plaintiff, then he cannot recover in this action. This is wholly regardless of what you may find to be the actual facts as to the conduct of the plaintiff's wife and the defendant, for a verdict for the defendant upon this ground would not necessarily determine that he was innocent of having alienated the love and the affection of the plaintiff's wife, but would be based upon the ground that public policy would not permit a husband to make money out of that to which he has consented, and to take advantage of his own misconduct. In this connection you may take into consideration the extent to which the plaintiff had knowledge of what took place between his wife and the defendant, what trips he accompanied them upon, and how often, if at all, he invited the defendant to his house, what presents he knew of his wife receiving from the defendant, how far he permitted and encouraged all these things, and other matters in testimony before you, and if you find that the plaintiff stood by and with knowledge thereof consented, acquiesced in, and encouraged this conduct through a series of years, he cannot recover in this action, for having shown his own willingness that such conduct might take place, he is not in a position to complain on account thereof.

If, however, the plaintiff has from the time of his marriage until the separation of his wife from him, on the ground of the alienation of her love and affection, or on the ground of her infidelity—if such took place—lived a chaste, virtuous life himself, and has in all essential respects treated her down to the time of the alienation of her love and affection from him, or down to the time of her infidelity, as an affectionate, kind and loving husband should treat his wife, and in determining how the facts are you may take into consideration the situation and circumstances in the life of the plaintiff and defendant, the family, the surroundings, the home and after considering the loss to the plaintiff of his wife's love, affection, companionship and society, give him such damages as you may think will compensate him for the loss and injury he has sustained. And in estimating the damages you must regard the character of the injury, the alienation of the love and affection of the wife, the debauchment of the wife, if such took place, and give the plaintiff damages—not only to compensate him for the loss of her love and society but also for all that he may feel from the nature of the injury. The jury has also a right to give what is called exemplary or punitive damages; that is to say, they have a right to find for the plaintiff in such sum as would be deemed a punishment for the defendant for his conduct, and which would be an example, for the purpose of deterring others from being guilty of like conduct.

The jury, however, should never give damages so excessive as to strike mankind at first blush as being beyond all reasonable measure of such damages, or such as would manifestly show that they had been actuated by passion, partiality or prejudice.

You will remember that the first cause of action stated in the petition charges the alienation of the affections of the wife from the husband, and the defendant with having induced her to separate from her husband, and go and live with the defendant in the city of Chicago.

The second cause of action stated in the petition charges him with having lived and cohabited in a state of adultery with plaintiff's wife since the — day of August, 1893.

The injury, if injury was done to the husband as charged in the second cause of action, consists in the dishonor of his marriage bed, the loss of his wife's affection and the comfort of her society, and the loss of her aid and assistance in his domestic relations.

The actual injury and the extent of it, depends very greatly on their prior relations, and in determining the amount of damages, should you find that the plaintiff is entitled to damages, the relation of the plaintiff to his wife, whether they lived happily or otherwise, the circumstances of their domestic life as shown by the evidence, should all be considered by you.

Whether Myers and his wife lived happily together or not does not lessen the wrongful conduct of the defendant, but the effect of that wrongful conduct on the plaintiff, if such wrongful conduct took place, is to be considered by you in estimating the damages he is entitled to recover.

If the defendant broke up a happy home by alienating the affections of a tender, loving and affectionate wife from her husband, the effect on the husband was greater than though there was little or no conjugal affection between them. His compensation is to be measured by the loss he has sustained.

There is no fixed rule for determining the amount of damages to be allowed in cases of this kind. It is not like a commodity sold in the market that may be ascertained by actual measurement, or that could be weighed in a balance; it has to be determined under all the facts and circumstances by the judgment of the jury, and in determining that question you are to take into consideration the social relations of the parties, the apparent affection that existed between the husband and wife before the time that the defendant is alleged to have begun his improper conduct, and the actual misconduct of the defendant who is alleged to be guilty of the wrongful conduct complained of.

If you should find that the defendant did alienate the affections of Mrs. Myers from her husband, and induce her to leave her husband and home and go and reside with him in the city of Chicago, the plaintiff will be entitled to recover from the defendant such damages as he has sustained by reason thereof.

If, on the other hand, the evidence fails to satisfy you by a preponderance of it, that the defendant did so alienate the affections of plaintiff's wife from the plaintiff, the plaintiff will not be entitled to recover.

On the second cause of action stated in the petition, if by the preponderance of the evidence you are satisfied that since the — day of August, 1893, the defendant and Mrs. Myers have been living together in the city of Chicago in a state of adultery, the plaintiff will be entitled to recover from the defendant such damages as he has sustained thereby.

And in determining this question whether the defendant and Mrs. Myers have been living in a state of adultery in the city of Chicago, since August, 1893, you will take into account all of the testimony tending to show the familiarity between Mrs. Myers and the defendant, their several trips up the lakes, to the hotels, and whether they have been living in the same house in the city of Chicago, and determine from all of it whether their relations and conduct have been such as to satisfy you that they have been living in a state of adultery.

If you find that they were so living in a state of adultery as I have stated, the plaintiff will be entitled to recover from the defendant such damages as he has sustained by reason thereof, remembering at the same time what I have said on the subject of the plaintiff's consent, acquiescence and connivance at any wrongful conduct on her part. If he did not con-

Myers v. Raynolds.

sent, acquiesce or connive at any wrongful conduct in that regard on her part, he will be entitled to recover such damages as he has sustained thereby: but if the testimony fails to satisfy you that the defendant and Mrs. Myers did so live since that time, towit, the —— day of August, 1893, in a state of adultery, your verdict on that cause of action should be for the defendant.

Gentlemen: You are the sole judges of the facts. You must receive the law stated by the court.

If, under the testimony and the instructions I have given you, you find for the plaintiff, you will assess his damages at such sum as you shall deem reasonable, not exceeding the amount claimed in his petition; if you find the issues in favor of the defendant, you will simply say so by your verdict.

You will, upon retiring, appoint one of your number foreman. I will have sent to you two forms of verdict, both of which will entitle the case, one of which will say, in substance, we find the issues joined in favor of the plaintiff and estimate the damages due the plaintiff at \$——. The other will say, in substance, we find the issues in favor of the defendant. Whichever of these forms you adopt, fill it up if need be, have your foreman sign it, and bring it with you into court.

These instructions you will have with you in your jury room, and you can read them in detail as you may have occasion to do. You may retire.

PROMISSORY NOTES.

[Hamilton Common Pleas, 1896.]

WADE V. BISHOP.

A broker's failure to secure, in accordance with his oral agreement, the cancellation of a mortgage on real estate taken in exchange or as payment for real estate sold by said broker, is no defense to notes executed and delivered by vendor to the broker as commission for making the sale or exchange, although the oral promise was part of the consideration for the notes.

The Bishops, owning some real estate, hired Wade, a broker, to effect a trade of it, and agreed to pay him \$500 if he was successful. He found a purchaser whose real estate was encumbered by mortgage for \$800.

The trade was effected and deeds passed, with the understanding that Wade was to secure the cancellation of the \$800 mortgage upon the land which the Bishops received. Wade wanted his pay, the Bishops wanted the mortgage cancelled; Wade assured and promised them that he would secure its cancellation, and they gave him these notes for the \$500. The notes mature, suit is brought, the mortgage is still in force, the Bishops admit delivery of the notes and urge his failure to secure the cancellation as an absolute defense to the notes.

CHARGE OF COURT.

WRIGHT, J.

The plaintiff, Wade, sues upon the several promissory notes; the defendants admit the execution and delivery thereof to him; wherefore

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Wade is entitled to verdict and judgment unless the defendants are able to make out such matters as in law amount to a defense.

We attend therefore to their claim in this regard: It is, that after Wade had found a purchaser for their property, he was for having his pay, which he was willing to take in the form of these notes; that the giving of the notes was suggested and agreed upon; that to the knowledge of all parties there then existed an \$800 mortgage encumbering the fee of the real estate which the defendants took in trade; that Wade made promise and obligated himself to secure the release and cancellation of this mortgage; that he has failed to make good this promise; that the mortgage is still alive, and a lien against the property of the defendants.

Taking this claim to be in all respects true, does it make a defense against the notes?

You observe in the outset that each note is upon its face an absolute and unconditional promise for the payment of a sum certain, at a fixed and definite time; you have in each note an unconditional written promise for the payment of money; that there was no consideration for the giving of these written promises is not claimed; upon the contrary it is admitted that Wade performed services of value; it is declared that he performed some, but neglected to perform a part of what he was obliged to; that he promised to do more, but has failed.

What if he has, does it establish that the written promises in the form of notes were never made?

Certainly not; for whatever Wade agreed to do, whatever he failed to do, you still have the written notes, and some good consideration for the giving of them.

Now, the situation develops that written promises to pay money were given upon the one hand in exchange for some very considerable services and an oral promise upon the other hand; be the oral promise not made good, yet the services are performed, and the written promises have nevertheless been made; a written promise once made upon good consideration must always remain a written promise, there is no escape from the recognition of it; the rendition of the services was a good consideration sufficient to make the written promise binding.

You have then a written promise, binding when it was made, against an oral promise, binding when it was made.

Both were binding then, both are binding now; failure to perform the oral promise does not destroy the written promise any more than nonpayment of the notes when they matured would have released Wade from the oral promise; while each may set off against the other his damages if promise be broken, yet a breach of either promise does not make the other void and worthless to the extent of creating a good defense against suit upon it.

The business of the law is to ascertain what rights arise out of those promises which are voluntarily made by individuals; it is not the business of the law to amend, alter, or hold for naught the obligations which individuals fully undertake for themselves; the law awards to each individual the prerogative of entering into, or refraining from contractual relations with others; it leaves to each the making of his own bargains, be they good or bad; if one makes a good bargain his foresight and prudence are to be commended; if a bad one, he has none to blame but himself, and while he may be an object of sympathy and commiseration, yet his bargain is his bargain, and he must abide by it, bad though it be;

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the law will not, indeed cannot undertake to shield him from the consequences of mistaken judgment, or to relieve him from his obligations, when their fulfillment turns out to be a hardship; he was the dictator of his course, and the law will attend either choice with the natural and necessary results.

It may be said that the defendants committed an error of judgment in delivering these notes to Wade prior to the cancellation of the mortgage, that they made a mistake in taking his promise about the mortgage; but, mistake or no mistake, this they have done, and voluntarily; they have delivered their notes and have taken his promise; they chose to rely upon his promise then, when they might have chosen otherwise and withheld the notes.

They cannot be heard to say that they promised to pay only conditionally, for they are confronted with their own writings—the notes—which show that the promises to pay were unconditional, and when once a promise is made in writing, the law will permit no one to say that he did not promise what the writing so plainly shows he did promise.

I must therefore advise you that the matters urged by the defendants do not make a good defense to the notes, and that the law puts upon you the duty of rendering a verdict for the plaintiff upon each of the notes, together with the interest upon each at the rate of six per cent. per annum from the day of its maturity up to the seventh day of January last past. These several items you may compute together in one total sum.

I have thus far seemingly assumed that Wade agreed to secure the release of the \$800 mortgage; this was but for convenience in the application of the law; as to the truth of the matter I can have no knowledge, but desire you to determine it from the evidence bearing upon that point, to the end that this trial may settle the question between the parties, and that it may never have to be litigated any more.

You will therefore attend to and answer the special interrogatory which I now submit to you:

If you find from the evidence that he did, let your answer be "Yes;" if he did not, let your answer be "No." The burden is upon the defendants to prove by a preponderance of evidence that he did so agree.

Your foreman may sign the answer to the special interrogatory as well as the general verdict.

W. W. Prather, for plaintiff.

R. S. Fulton, for defendant.

BRIBERY.

[Franklin Common Pleas, April term, 1896.]

STATE OF OHIO V. IDEN.

1. It is not necessary, in order to establish the crime, under the statutes of Ohio, that the money should be counted out or tendered by accused. The statement that he will pay a certain sum, although no time is fixed for payment, is sufficient proof of the fact of an offer or a promise by accused.
2. An indictment alleging that accused offered or promised money with and for the purpose of influencing M. with respect to his official duty is comprehensive enough to embrace any of the duties of the clerk of the house of representatives and under this general charge the intention is sufficiently proved.

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3. Corruption, when applied to officers etc., signifies inducing, by means of pecuniary consideration, a violation of duty. An act is said to be corrupt or corruptly done, when the chief motive is a design to acquire an advantage of a pecuniary nature or when it is done for unlawful profit.
4. Silence under an imputation cannot be considered as an admission of the truth of the charge unless the circumstances are such that a denial would naturally be expected, or an explanation would naturally be called for.
5. A conservative and safe rule, when witnesses contradict each other, is to give the preference to the one who has the least inducement, from interest or other motive, to testify falsely, other things being equal.

PUGH, J.

Gentlemen of the jury: The law of Ohio declares that whoever corruptly offers or promises to any officer of either the house of representatives or the senate of the state legislature any valuable thing to influence him with respect to his official duty or to influence his action in any matter pending, or that might legally come before him, is guilty of a crime, and shall be punished by either imprisonment in the penitentiary or by a fine, or by both, as the court may decide. When one violates this law, he is not, as one of the counsel argued, necessarily guilty of a penitentiary offense. The court determines whether it is that or a misdemeanor.

On April 25, 1893, John Malloy was the clerk of the house of representatives. At that time there was pending in the house a bill to appropriate \$12,000 for the improvement of certain militia encampment grounds situated near Newark. That bill was, on that day, voted upon in the house.

One of the duties of John Malloy, the clerk, was to call the roll of the members when a vote was cast upon a bill, to record these votes, to add up the number voting for and against any bill, and to report it to the speaker.

The constitution of the state ordains that on the passage of every bill, in either house, the vote shall be taken by yeas and nays and entered upon the journal, and that no law shall be passed in either house without a concurrence of a majority of all the members elected thereto. To authorize the passage of the bill mentioned in the indictment, two-thirds of the members had to concur.

The specific charge in the indictment is, that the defendant then corruptly offered and promised Malloy \$50, with the intent to influence him with respect to his official duty, and with and for the purpose and intent of influencing and inducing him to so call and record the votes of the members of the house that the record should show that the votes of two-thirds of the members were given in favor of the bill, if it should happen, on the call of the roll, that the votes of two-thirds of said members should not in fact be given in favor of said bill.

The defendant, by his plea of not guilty, denies the charge. That makes the issue for trial. The question is, Is he guilty or innocent?

Just like all other cases, this case had to be made out by proof. The burden of proving it was upon the state. It was not necessary that it should be proved by direct and positive evidence, but it was sufficient, in the judgment of the law, if that species of evidence, combined with facts and circumstances of such force and weight that, when united and considered together, they left no rational doubt in the mind as to the truth of the charge contained in the indictment. The administration of the criminal law is essentially dependent, in a large degree, necessarily, on the evidence and force of circumstances, for the purpose of making out criminal charges. This results from the fact that persons who commit crimes

State v. Iden.

ordinarily seek concealment. Ordinarily the public eye, but occasions are sought for their commission when and where safety and security from observation, or from prosecution and punishment, to a certain degree, may be within the hope and expectation of the offenders. For this reason it has been found, in the intelligent administration of the criminal law, necessary to resort to the force and effect of circumstances in order to discover from the inferences that may be drawn from the circumstances whether the offense has, or has not, been committed. But whether positive testimony, or circumstantial evidence, or both, are relied upon to establish a criminal charge, it must be of such a persuasive or satisfactory character as to leave no rational doubt of the defendant's guilt before he may be convicted. The positive evidence, or the circumstances, or both, are required to be of so forcible a nature as to exclude every other reasonable supposition or hypothesis or theory than that of the defendant's guilt, before a conviction can be reached.

When circumstances are relied upon, the jury has no right to regard or treat them with suspicion, for, in the ordinary affairs of life, men are accustomed to appeal to circumstances for the purpose of determining the truth of conflicting statements, or conflicting rumors or reports, and, when there is a conflict between witnesses in the courts of justice, nothing is more common than to determine the controversy by appealing to some significant circumstances that may be developed by the proof, indicating where the truth lies between the persons who may swear directly opposite in the course of their examination.

I have said the state had to prove the charge made against the defendant, and it had to be proved by evidence which satisfies you beyond a reasonable doubt. The law clothes him with the presumption of innocence. The facts proved must not only all be consistent with and point, beyond a reasonable doubt, to his guilt, but they must be inconsistent with his innocence. If the evidence taken as a whole leaves it uncertain which of two or more inferences from the facts proved is the true one, or merely establishes a probability of his guilt, no matter how strong it is, it is not enough to convict him.

It is your duty to take all the evidence, all of the facts and circumstances proved, not separately and distinctly, but massed together. Having fully and carefully considered them, the question must then arise in your minds, what is their effect and force? Do they carry your convictions beyond a reasonable doubt as to the defendant's guilt? If they do it is your duty to convict him without any hesitation. If they fail to produce that effect, then you should be led to a verdict of acquittal.

The measure of that reasonable doubt of the defendant's guilt which will entitle him to an acquittal is a question addressed to the judgment and conscience of each of you. Each of you must exercise your own judgment. Each of you must consider the weight and effect of the evidence upon his own mind.

The only mode by which a criminal case like this can be decided in this state is by the verdict of a jury.

The verdict to which each of you agrees, if you should agree, must, of course, be the result of your own convictions, and not a mere acquiescence in the conclusion of your fellow jurors. At the same time in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor.

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In conferring together you should have a proper regard for each other's opinions. You should listen with a disposition to be convinced by each other's arguments.

But the rule of reasonable doubt does not mean that the defendant's guilt had to be proved beyond any doubt, that it must be demonstrated absolutely, so that there is no evil or conjecture, or surmise, or no possible doubt that can be arrayed against the conclusion of his guilt. No one ever reached a conclusion against which some doubt might not be arrayed. And this rule of reasonable doubt was never intended to aid any one, who is in fact guilty of a crime, to escape deserved punishment.

The issue, whether the defendant is innocent or guilty, you must decide upon the evidence, and the reasonable inferences from it, and under the application of the law as it is given to you in this charge. It would be a violation of your oath, if you should decide it upon any facts not proved by the evidence elicited from the witnesses in the witness chair. You would be utterly unworthy to fill places in the jury box, if you should go into the jury room and there consider and determine the question by some fact or facts, which were never heard of in, or supported by, the evidence. If any of the attorneys have made any arguments, or advanced any suggestions which were not warranted by the evidence, or the reasonable inferences from it, you should not allow them to have any influence or weight upon your minds. Lay them aside as wholly foreign to the question at issue, which must, as I said, be determined strictly upon the evidence introduced before you and the reasonable deductions from it.

To illustrate, there is no evidence here to prove that the legislation is full of corruption, and claims of that character are wholly foreign to this case.

There was no evidence to prove that the witness Malloy was drunk on the occasion when the alleged offer or promise of a bribe was made, and you should not be led away by fierce denunciations, by heated language of counsel, imputing drunkenness to him. Again, there was no evidence to prove the claim that Malloy had been educated at public expense because he had been a soldier's son.

You should entirely dismiss from your minds all claims and contentions not warranted by the evidence or the reasonable deductions from it, or both.

Now, I will invite your attention again to the charge in the indictment.

It accuses the defendant of having offered and promised Malloy \$50 with the intent and for the purpose of influencing him with respect to his official duty, and also with the intent and for the purpose of inducing Malloy, as clerk of the house, so to call the roll and record the votes of the house on the bill mentioned, and the record should show that the votes of two-thirds of the members were given in favor of it, if it should happen, on the call of the roll, that the votes of two-thirds of the members should not, in fact, be given in favor of the bill.

That the defendant offered or promised Malloy \$50 is one of the essential facts which had to be proved; but to make it out the state did not have to prove that the money was counted out or tendered to Malloy by the defendant. If he said he would give him \$50, although he fixed no time when he would actually give it to him, that would be sufficient proof of the fact of an offer or a promise of the money by the defendant.

Another element of the offense charged is the intention. First, the indictment generally charges that the defendant offered or promised the

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money with and for the purpose of influencing Malloy with respect to his official duty. That is comprehensive enough to embrace any of the duties of the clerk, and under this general charge, of the defendant either offered or promised \$50 for the purpose of influencing Malloy with respect to any of his duties, the intention was sufficiently proved.

But it is further charged in the indictment that the defendant offered or promised the \$50 with and for the purpose of inducing Malloy to so call the roll and record the votes that it would show two-thirds of the members had voted for the bill in case it should happen that two-thirds of them did not, in point of fact, vote for it; and the evidence offered by the state only tends to prove that purpose or intent. Malloy being a public officer, he had no lawful right to receive, and no one had any lawful right to pay him, money or any other valuable thing, to influence him to perform any of his official duties, or to act contrary to his official duty. This is true, because he received a salary which was all he was entitled to receive for the performance of his official duties.

Now mark you, gentlemen of the jury, to constitute the crime charged and to prove it, the state did not have to prove that any money was paid by the defendant to Malloy. He is not accused of actually giving a bribe which was accepted. That is not the kind of a case you are trying.

Another essential element of the crime charged and which had to be proved is that the defendant corruptly offered or promised the \$50 to Malloy.

Corruption when applied to officers, etc., signifies inducing, by means of pecuniary consideration, a violation of duty. An act is said to be corrupt or corruptly done, when the chief motive is a design to acquire an advantage of a pecuniary nature, or when it is done for an unlawful profit.

Now, as to the proof. The intention or purpose charged in the indictment did not have to be proved by direct or positive evidence.

Malloy testified that the defendant said to him: "I am very much interested in the passage of this encampment bill. If I can get the bill through, it will re-elect me. You want to see me come back here?" To which Malloy says he replied: "Yes, sir; I want to see every Republican elected. There are enough votes in the house to pass the bill, if you can get them." Next he says that the defendant said: "If the bill passes, there is \$50 in it for you." To which Malloy says he replied: "Iden, you have got your nerve to come to me with a proposition of that sort."

Next Iden said: "Well, now, I did not mean it in the nature of a bribe, and I don't want you to think of it that way." To this Malloy says he responded: "You get away from here. If the bill gets the votes it will pass; every vote that is cast for it will be recorded for it; if it does not get the votes it won't pass." And he says that he then brushed Iden away from him and went back to his desk, and that just before he started to call the roll, Iden came up again and said: "Malloy, I don't want you to think I meant anything by that." Malloy says he replied: "God damn you, if you don't get away from here, I will have the speaker put you off the floor of the House." After calling the roll, and after the bill had passed, he says he notified the speaker of what had taken place.

After considering all the testimony bearing on what occurred between Malloy and Iden, offered by both sides, if you should believe what Malloy said about it, one question for your consideration is, what did Iden mean by saying to Malloy: "If the bill passes, there is \$50 in it

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for you." Why should there be \$50 in it for Malloy? What, if any believe that? What is your judgment on these questions? What also reasonable or probable that he was to get \$50 for nothing? Do you believe that? What is your judgment on these questions? What also was the significance and the meaning of Iden's statement that he meant nothing by what he said, if you find he said that? You must look at and decide these questions like men of common sense.

The state relies upon and appeals to the testimony of Johnston and Faulkner as corroborating the testimony of Malloy. Johnston was an assistant clerk. He testified that he was standing at the desk where they called the roll when the conversation occurred between Malloy and Iden, they being possibly eight feet from where he was, to his right and back. He says Iden approached from the aisle, touched Malloy on the elbow or sleeve and then they retired to the right, and went back towards the window. He did not hear the conversation; but he testified that he saw Iden lean his head toward Malloy and that Malloy straightened up and looked at Iden for a second or two and shook his head. He also testified that Malloy pointed his finger at Iden and made motions and then took a step or two towards him, the witness, and that Iden was not over two or three feet from Malloy.

These are circumstances which it is claimed, tend to corroborate Malloy's version of what was said in the conversation between him and Iden. What weight shall be attached to them is a matter for you to decide.

As Malloy turned round and took a step or two towards him he said Malloy said: "What do you think that son of a bitch said to me? He offered me \$50 to pass his bill." Shortly after that, right away, Iden came around in front of the desk. He says Iden said nothing when Malloy made the statement I have just quoted.

This witness also testified that he heard Malloy say to Iden after he came to the desk: "If you don't go away, I will have you taken away," or "will have the sergeant-at-arms put you off the floor," or something of that kind; he did not remember just the words used.

After Johnston testified, Malloy again testified that he did say to Johnston, after he had talked to Iden: "What do you think that son of a bitch did to me; he offered me \$50 to pass his bill;" but he said he did not know where Iden was when he said it. He says he was excited and worked up at the time.

Faulkner testified that his desk was to the right of the speaker's. He heard Malloy speaking in an elevated tone of voice, that being the first thing that attracted his attention. When he reached the clerk's desk, he saw Iden backing out from behind the clerk's desk and Malloy was facing him and saying: "Get from behind this desk." Iden said: "Hold on, John; now, hold on." He came around in front of the desk and Malloy insisted that he should go away entirely.

He took Malloy's arm and said: "What is the matter, John?" Iden was across the desk apparently trying to explain and he was looking directly at Malloy, and Malloy said in answer to his question: "That little son of a bitch tried to fix me on this roll call." Iden said nothing in reply to this.

As has already been said, it is claimed that the testimony of Johnston and Faulkner corroborate Malloy as to the main criminating fact. It is contended that when Malloy told Johnston and Faulkner what Iden did, it meant that he charged him with offering him money to pass the

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bill, and that Iden's silence, his failure to deny it, is a virtual admission of the truth of the charge, and that you have a right to presume from his silence that he acquiesced in its truth. I have to submit this question to you, because, as the law puts it, "There is a conflict in the proof of the attending circumstances." If it were not for this conflict, I would have to decide the question because it would then be a question of law.

Silence under an imputation can never be considered as an admission of the truth of the charge, unless the circumstances are such that a denial would naturally be expected, or an explanation would naturally be called for. First, before you can give any weight to the testimony of Johnston and Faulkner, touching what Malloy said about Iden's conduct, as corroborative evidence, as an evidence of an admission by Iden, you must be satisfied that Iden heard what Malloy said to them. This is a question of fact which you must decide upon the evidence, pro and con. You have heard the witnesses testify as to the distance between Malloy and Iden at the time he made the statements or charges against Iden to Johnston and Faulkner. And next, you must be satisfied that the circumstances must have called for either serious admission or denial on his part. The strength of the evidence depends altogether upon the force of the circumstances and the motives which must have impelled him to an explicit denial, if the statements of Malloy were untrue. If the occasion was such, and the manner of making the charges by Malloy such that they would reasonably justify silence, in a discreet and prudent person, no unfavorable inference against Iden ought to be drawn from his silence.

As was before stated, the defendant denies the charge made in the indictment. He also testifies in his own behalf. Miller and Lyons also testified in his behalf.

Miller testified that he and Iden went to the clerk's desk together; that Iden asked Malloy if he would not call the roll slower, because there were a number of friends of the bill that possibly would not get in, or would be in the lobby, and to give them a chance to get them in; that they had a clear majority, or something of that sort; and that Malloy then said the bill was gone. He answered Malloy by saying it was "rather a shame; that Newark had done this in good faith and gave the state of Ohio the grounds and ought to have something in return;" and that Iden said that he would as soon lose \$50 out of his own pocket than to see the bill defeated. He also testified that nothing was said about Mr. Malloy "would have \$50 in case the bill passed."

This witness also said that he did not see Malloy go from the front of the speaker's desk to the north window, and that he did not recollect it if he did; and in regard to this he differs from the other witnesses, Iden and Lyons. He further said that he believed he was in a position to see them, if Malloy and Iden had gone over there to have a conversation; but that if such a thing did happen he might not have remembered. On cross-examination this witness said that the talk with Malloy took place a little out from the clerk's desk, to the right of the speaker's stand, "possibly four or five feet." He denied that Iden went up to the clerk and said that he did not mean anything by what he had said; and he says he did not hear Malloy tell Johnston that Iden had offered him \$50 to pass the bill. This witness did not testify that Malloy said he would call the roll slowly.

The defendant testified that he and Miller went around, as Malloy said, on the north side of the speaker's desk, around towards the window,

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and he asked him to call the roll slowly and Malloy said he would do it. Malloy told Miller the bill was gone; Miller said it was a shame, and then he (Iden) said he would rather lose \$50 out of his own pocket than to have the bill defeated. He denied that he offered or promised Malloy \$50 for any purpose. He denied that Malloy used the language concerning him to Johnston to which Malloy and Johnston testified, and he denied that Malloy used the language to Faulkner to which the latter testified.

Lyons testified, as did Miller and Iden, that the latter two were sent to the clerk for the purpose of asking him to call the roll slowly; that he saw Iden and Miller go down one of the aisles and go to Mr. Malloy; that they took him and walked around at the corner near the window, upon the side at which the speaker enters his desk, and that they were there together in the neighborhood of a minute and a half or two minutes, engaged in conversation, and that after they were through Iden came back and reported that the clerk said that he would call the roll slowly, and that he did not say anything about Malloy having used insulting language about him or to him. In rebuttal, Malloy testified that Miller never spoke to him, or that he ever spoke to Miller in his lifetime, and that Miller was not present when he and Iden held the conversation to which he testified in chief. He denies that either Iden or Miller asked him to call the roll slowly, so that they could get the friends of the bill out of the smoking room and the lobby and other places to vote for the bill. He denied that he told either of them that he would call the roll slowly, or that the bill was dead, or that Iden said he would rather lose \$50 than to have the bill defeated. In rebuttal, Johnston testified that no one was present with Malloy and Iden, when they were engaged in conversation at the north of the speaker's desk, and that they were there alone.

I have in this way attempted to give you an abridged statement of the material evidence to the main fact. But you must distinctly understand that what I have said about the facts and the evidence is only advisory, to aid you, and in no wise intended to fetter the exercise of your independent judgment, or to absolve you from your duty of deciding questions of fact. I have a right to aid you by recalling the salient and vital portions of the evidence to your recollection, by collecting its details, by directing your attention to the most important facts, by eliminating the true points of inquiry, and by urging upon your consideration the duties which you owe to the public and the defendant, when matters have been presented or argued which are calculated to mislead you.

From the brief summing up of the testimony of the witnesses for the state and the defendant, as to the main fact, you have doubtless observed that there is a sharp and direct conflict between their testimony. In weighing and considering the testimony, you should endeavor to reconcile and harmonize it. If you cannot do that, then your duty is to determine what portion of the testimony is most worthy of belief. You do not necessarily have to determine where the truth lies by the number of witnesses testifying on each side, though it is a fact that may be considered and given its due weight. It is rather not a question of numbers, but a question of weight, of the value and trustworthiness of the testimony.

You should, in weighing the testimony, consider the circumstances by which the witnesses were surrounded, their means of information and opportunities for knowing the facts about which they testified, and their interest, if any they have shown, in this litigation, in the verdict you may render. A witness may be biased by his connection with the case, or his interest in the result of the case. You should also consider the manner

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and bearing of the witnesses on the witness stand. Did they exhibit a zeal in stating facts favorable to one side, and a reluctance to state facts favorable to the other side? Did they testify in a frank, candid, straightforward manner? Or did they equivocate or evade? You should likewise consider the consistency of their testimony with itself, and whether each witness's testimony is corroborated or contradicted by undisputed or well-established facts about which you have no doubt. You should also consider whether the statements of the witnesses were probable and reasonable, or improbable and unreasonable. The rules and principles of evidence address themselves to the common sense of mankind. Your every-day experience, common sense and intelligence may be applied in analyzing and placing an estimate upon the statements made by the witnesses, and in determining which side of conflicting and contradictory testimony best harmonizes with the truth of the actual fact. A conservative and safe rule, when witnesses contradict each other, is to give the preference to the one who has the least inducement, from interest or other motives, to testify falsely, other things being equal. When credible witnesses testify to a fact or facts about which there is no conflicting testimony, then your plain and manifest duty is to give credit to such witness or witnesses, and consider such fact or facts as established, and follow the same to its or their logical result.

But, after all that I have said on the subject of the credibility of the witnesses and the weight to be attached to their testimony, the question is exclusively one for your decision, and what I have said is not intended to free you from the responsibility and duty of deciding which of the witnesses you will deem trustworthy or untrustworthy, and what weight you will give to their testimony.

During the trial some allusions to politics were made. It would be highly improper and reprehensible for either the court or you to allow any party sympathy or prejudice to either bias or control a judgment or action in honestly considering and fearlessly deciding the case on its merits, and as its merits are established by the evidence. To consciously permit such considerations to control your actions or conclusions in the case would be to disregard the obligation of your oaths and render you unworthy of the position you occupy. Let all party affiliations be studiously discarded, and let the question of guilt or innocence of the defendant be investigated and determined alone upon the evidence which was introduced before you.

There is another matter to which I call your attention: This trial in no way involves a consideration of the propriety or merit of the gift of the encampment ground of the state, made by the people of Licking county. The fact that such a gift was made neither proves nor disproves the charge of crime preferred in the indictment against the defendant.

A defendant in a criminal case has a right to lay before the jury, in evidence, his previous life. This defendant has, through his attorneys, done that in this case. He did not put his character or reputation in issue by calling other witnesses to testify to it, and, therefore, the state had no right to offer testimony on that subject. But he has himself testified to the previous acts of his life. This evidence is not, however, conclusive in his favor. It is simply evidence to be considered with all the other testimony in the case for the purpose of determining whether the proof, taken as a whole, together, establishes his guilt beyond a reasonable doubt. It suggests and raises the question whether a man whose previous life had been blameless would be likely to commit a crime. If

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the evidence considered as a whole, altogether, does not establish his guilt beyond a reasonable doubt, even this evidence as to his previous life may create a reasonable doubt. But when you come to take the evidence of his previous life, together with all the other evidence submitted to your consideration, and when you look at it and consider it, and weigh its effect and force upon your minds, and if you are then convinced, beyond a reasonable doubt, that the defendant is guilty, notwithstanding his previous blameless life, notwithstanding his standing and position in the community where he lives—he is, in the judgment of the law, guilty, and it is your duty to pronounce him guilty. It would, in such case, doubtless be a painful duty to perform, but the law has imposed upon you, and you are bound to stand by it and meet and discharge it like men of courage and intelligence. When defendant's guilt is established beyond a reasonable doubt, notwithstanding the fact that his previous life has been pure and honored, yet, if he shows that he was deviated from the influences and inclinations by which his previous life was guided, he is as culpable as any other criminal.

The attorneys, from their respective and opposing positions of advocacy, have left nothing undone or unsaid which could influence your verdict, or to enable you to see their respective causes in the fullest and clearest light. I have endeavored to instruct you as to the law and your duty. The case is now left to you. Carefully and fairly weigh the evidence. Decide the case without regard to the consequences of your verdict. Let impartiality, fearlessness and a scrupulous regard for duty signalize your actions. If the evidence leaves your minds free from any reasonable doubt of the defendant's guilt, do not hesitate for one moment to find him guilty. On the other hand, if the proof leaves your minds in that state of uncertainty and indecision which constitutes reasonable doubt, give him the benefit of it and acquit him.

NEGLIGENCE.

[Lorain Common Pleas, 1896.]

JOHN MAITLAND V. C., L. & W. R. R. CO. ET AL.

1. Whether defendant was negligent in requiring plaintiff to perform his work in a room where there were dangerous and poisonous gases, and where there were drafts of cold air blowing upon him, is a question for the jury.
2. Before plaintiff can recover for injuries sustained by being required to work in a room where the atmosphere was poisonous and unwholesome, said plaintiff knowing the fact but not knowing the effect upon his person or system, it must be shown by a preponderance of the evidence that the defendant, through its agents or servants, knew, or by the exercise of ordinary care ought to have known, of the dangerous effects of said poisonous and unwholesome atmosphere.

CHARGE TO JURY.

NYE, J.

The plaintiff by his amended petition says:

"Now comes the plaintiff by leave of the court first obtained, and amends his petition heretofore filed, and names the said defendant The Cleveland, Lorain and Wheeling Railway Co. which has already appeared herein by demurrer, as party defendant hereto."

"And plaintiff says that at the time of the commission of the grievances hereinafter mentioned, the defendant, The Cleveland, Lorain and Wheeling Railway Co. was a corporation, organized under and by virtue of the laws of the state of Ohio, having its principal office in the city of Cleveland, in the county of Cuyahoga in said state, and owning and operating a railroad, running through said county of Lorain, and having shops in the village of Lorain in said county, where it employed many men in and about its said railroad business, handling, running and repairing its engines and cars and doing other matters connected with its said business, and was bound to provide for its employees safe and proper appliances for their work and safe and proper places in which to perform the same.

"Since the commission of the hereinafter mentioned grievances the said corporation has changed its name, either by consolidation with some other railroad company or otherwise, and is now known as The Cleveland, Lorain and Wheeling Railroad Co., defendant, in and about its said shop duly organized and incorporated under and by virtue of the laws of the state of Ohio, and having its principal office in the city of Cleveland, in the county of Cuyahoga in said state, and owning and operating a railroad extending through and across the said county of Lorain, and under the said name of the Cleveland, Lorain and Wheeling Railway Co. is responsible for the hereinafter mentioned grievances.

"The said two apparent defendants, The Cleveland, Lorain and Wheeling Railroad Co. and the said The Cleveland, Lorain and Wheeling Railway Co. are by said change of name, through said consolidation or otherwise, substantially and for the purposes of this action, one and the same.

"On January 10, 1893, and from then to and including the eighteenth day of said month, the plaintiff was employed by the said The Cleveland, Lorain and Wheeling Railroad Co., defendant, in and about its said shop as a machinist, doing and performing such labors in the line of his said trade, as said defendant directed, and did on said days so work for said defendant under its direction in repairing a certain locomotive engine within one of said shops known as the round-house.

"But the said defendant, The Cleveland, Lorain and Wheeling Railroad Co., did not provide for the plaintiff safe and proper appliances for his said work, nor a safe and proper place in which to perform the same; but so negligently and carelessly conducted its business and performed its duties and obligations toward plaintiff as to require plaintiff to perform his work in a room where dangerous and poisonous gases were constantly being generated by said defendant, which room was insufficiently ventilated, and was not provided with proper and adequate means to prevent said dangerous and poisonous gases from mingling with the air of the room and being breathed by plaintiff, whereby said dangerous and poisonous gases filled the said room and plaintiff was compelled to breathe the same.

"And on the days aforesaid the weather was extremely cold and inclement, and such was the nature of said dangerous and poisonous gases, which the same were being generated by fires of coal and said defendant railroad company's locomotive engines, standing in said room, and such the effect of said gases upon the system and health of any person breathing the same as to greatly enhance their dangerous and poisonous effects by the admission into the lungs of said person at the same time or soon thereafter of extreme cold air.

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"But the said railroad company, defendant, so negligently and carelessly conducted its said business and performed its duties toward plaintiff as to require plaintiff to work before and in close proximity to a door opening into said room from the cold air outside said building, which door the said defendant railroad company was constantly causing to be opened, thereby causing drafts of cold air to be constantly blowing upon plaintiff, and plaintiff in order to perform his work was compelled to breathe said gases and said cold air in connection with said gases, and soon after breathing said gases.

"The plaintiff was ignorant of the dangerous and injurious effects of breathing said gases, and of breathing cold air in connection with said gases, and soon after having breathed said gases and was ignorant of the extent of said dangers."

"But soon after commencing the aforesaid work the plaintiff having noticed unpleasant and injurious effects from breathing said gases, and said cold air in connection with said gases as aforesaid, protested to said defendant railroad company against being compelled to work where he was compelled to breathe said gas and said cold air, and said cold air in connection with the following said gas, and the said defendant railroad company thereupon promised to remedy said defects and remove said dangers and to provide for said plaintiff a place to work free from said gases and cold air, and to provide good and sufficient ventilation for said room so that said gases should not come in contact with plaintiff while at his said work, to close and secure said door so that it should not be opened while plaintiff was there at work, and to prevent said cold air blowing upon plaintiff, but the said railroad company did not keep its said promise to plaintiff or any of them, but left said room insufficiently ventilated and caused said gases constantly to be generated and to escape into said room, and said door to be opened and said cold drafts of air to blow upon plaintiff and required plaintiff still to work where he was compelled to breathe said gases and said cold air.

"And the plaintiff relying upon the said promises of said defendant railroad company, and being ignorant of the danger of breathing said gases and said cold air, and the one mingled with or soon after the other, and being ignorant of the extent of said dangers, did continue to work for said defendant railroad company through the time aforesaid, breathing said dangerous and poisonous gases and cold air, whereby plaintiff was rendered sick, sore and distressed in body and in mind, and was permanently injured in health, resulting in his constant suffering and expense, and in decreased ability to support himself and his family, and has been compelled to pay large doctor's bills in and about procuring relief from his said sickness to his damage.

"And plaintiff says in all said matters he has been without fault or negligence and that by reason of the negligence of the said defendant railroad company he has been damaged in the sum of ten thousand dollars and for his costs herein expended."

"For answer to the amended petition of said plaintiff, the defendant, The Cleveland, Lorain and Wheeling Railway Co., says, not denying it is a corporation as stated, nor that the Cleveland, Lorain and Wheeling Railroad Co. was a corporation as stated, owning and operating a railroad as stated, nor that it was consolidated with the Cleveland and South Western Railway Co.; nor that it is known as the Cleveland, Lorain and Wheeling Railway Co., nor that plaintiff was an employee of the said railroad company, it denies each and every other allegation.

and averment in said amended petition contained. Further answering, defendant says, that whatever injury was received by plaintiff was in consequence of his own negligence and not by reason of any negligence on the part of this defendant.

"Wherefore defendant prays said amended petition may be dismissed."

These, I say to you, are the claims made by the respective parties to this action, and the testimony which has been given to you on the trial of this case has been given to you for the purpose of advising you of the facts and circumstances of the case, that you may determine the issues between the parties justly and intelligently.

I will now direct your attention to some of the more important questions for your consideration and determination.

The order which I use is for my convenience, and when you come to consider the case, you may take them up in the order which I shall use or in any other order which shall seem most convenient to you.

First—Was the defendant, the Cleveland, Lorain and Wheeling Railroad Co., guilty of negligence in performing its duties towards plaintiff, in requiring him to perform his work in a room where there were dangerous and poisonous gases and where there were drafts of cold air blowing upon plaintiff as complained of in his petition?

Second—If said defendant, the Cleveland, Lorain and Wheeling Railroad Co., was guilty of negligence in the particulars complained of, did such negligence of the defendant company cause the injuries to the plaintiff?

Third—Did the plaintiff contribute to his injuries by his own negligence?

To enable the plaintiff to recover in this action, he must establish by the testimony among other things the following propositions:

First—That the defendant, The Cleveland, Lorain and Wheeling Railroad Co., was guilty of negligence in the particulars complained of in plaintiff's petition.

Second—That plaintiff's injuries were caused by such negligence of said defendant company.

It then becomes important for me to define to you the meaning of the term negligence.

Negligence is the violation of that duty which enjoins care and caution in what we do. It is an omission or failure to exercise ordinary care.

Ordinary care is that degree of care which persons of ordinary care and prudence are accustomed to use and employ under the same or similar circumstances, in order to conduct the enterprise in which they are engaged to a safe and successful termination, having due regard of the rights of others and the objects to be accomplished.

Negligence, therefore, is the omission or failure to employ and use that degree of care which would be exercised by a man of ordinary prudence and caution if surrounded by like or similar circumstances.

The law exacts of every person that in this conduct he exercises ordinary care to the end that another be not injured from the want of that care and vigilance which prudent men usually exercise.

To determine whether ordinary care has been employed in a given case, all the facts and circumstances of such case must be carefully considered. In no other way can the jury reach a correct conclusion respecting the exercise of such care.

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The measure of one's duty and obligation to another can only be ascertained by a consideration of all the circumstances in which the parties are placed.

Ordinary care under certain circumstances is not necessarily ordinary care under other and different circumstances.

It is a relative term, always to be determined by a consideration of the facts and circumstances surrounding the party who is called upon to exercise it.

An increase of danger increases the degree of care required. In situations of great peril, the law exacts greater care than in situations less perilous.

The degree of care should always be compared with and be in proportion to the danger threatened and the peril to be avoided.

This definition of negligence applies equally to the plaintiff and to the agents and servants of the defendant in the discharge of their respective duty.

Let us apply these principles and definitions to the present case.

It is claimed by the plaintiff that the defendant, The Cleveland, Lorain and Wheeling Railroad Co., did not provide for the plaintiff safe and proper appliances for his said work, nor a safe and proper place in which to perform the same, but so negligently and carelessly conducted its business and performed its duties and obligations towards plaintiff as to require plaintiff to perform his work in a room where dangerous and poisonous gases were constantly being generated by said defendant, which room was insufficiently ventilated and was not provided with proper and adequate means to prevent said dangerous and poisonous gases from mingling with the air of the room, and being breathed by plaintiff, whereby said dangerous and poisonous gases filled the said room and plaintiff was compelled to breathe the same.

The plaintiff further says that at said time the weather was extremely cold and inclement, and such was the nature of said dangerous and poisonous gases which were being generated by fires of coal, and said defendant company's locomotive engines, standing in said room, and such the effect of said gases upon the system and health of any person breathing the same as to greatly enhance their dangerous and poisonous effects by the admission into the lungs of said person at the same time or soon thereafter of extreme cold air.

Plaintiff further says that said defendant company so negligently and carelessly conducted its said business and performed its duties towards plaintiff as to require plaintiff to work before and in close proximity to a door opening outside said room from the cold open air outside, which door the said defendant railroad company was constantly causing to be opened, thereby causing drafts of cold air to be constantly blowing upon the plaintiff, and plaintiff in order to perform his work was compelled to breathe said gases and said cold air in connection with said gases and soon after breathing said gases.

The defendant on the other hand denies that there was any negligence or carelessness on the part of the defendant, its agents, servants and employees, and said defendant company says that whatever it did was done in the usual and ordinary way of doing the work and managing the business in which said defendant was then engaged.

The defendant further says that if the plaintiff received any injuries they were received by reason of his own negligence and want of due and ordinary care on his own part.

You will observe that there are two things particularly complained of by the plaintiff.

The first is, that the defendant's building or round-house was so imperfectly and defectively constructed that it allowed impure and poisonous gases to collect and remain in said building to the injury of the plaintiff.

The second is, that said building was so negligently and carelessly constructed that it allowed the wind and cold air to blow in upon plaintiff where he was then at work.

The plaintiff further claims that he was compelled by the defendant to work in said dangerous and poisonous gases and in the cold air and wind which he claims blew upon him.

It is then a question of fact for you to determine in the light of all the evidence which has been given to you in this case, whether the defendant, The Cleveland, Lorain and Wheeling Railroad Co., was negligent and careless in providing a room for plaintiff to work in, or whether said defendant use such care and prudence as men of ordinary care and prudence are accustomed to use under the same or similar circumstances, who are engaged in a business similar to that in which the defendant was then engaged.

The solution of this question depends upon the peculiar facts and circumstances of this case. The state and condition of the parties, the manner in which and the circumstances under which the injury was received or contracted.

In short all the circumstances surrounding the transaction which in any way reflect upon either the degree of care or the manner in which in this particular case it should have been exercised.

It is your duty to consider all the testimony that has been given to you upon the trial of this case, and weigh it carefully and then say from it all where the truth lies.

You will consider the testimony relating to the particular business in which the defendant was engaged—did it in view of all the circumstances of this case, exercise due and ordinary care in providing a suitable building, room and appliances for the business, or did it omit to exercise it?

You should consider the kind of machinery which the defendant company had to repair, the kind of building in which said machinery was placed for repair, the time of year when said transaction took place, together with all the other facts and circumstances as shown by the evidence given you upon the trial of this case.

Did said defendant use such care and caution in providing a building due and ordinary care in managing and conducting its business, or did it omit to use it?

Did said defendant use such care and caution in providing a building and room and in looking after and caring for the same as men of ordinary care and prudence would have done for the safety of their employees under the same or similar circumstances?

If you find that the defendant did use such care and prudence in providing a building and room, and caring for the same as men of ordinary care and prudence would have done under the same or similar circumstances, then said defendant would not be liable.

But if you find from the evidence given you in this case that the defendant company failed and neglected to provide a suitable and proper

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building and room for its employees to work in, and knowingly allowed and permitted dangerous and poisonous gases to be and remain in said room, then said defendant company would be guilty of negligence in so doing.

I say to you as a matter of law that in the absence of a contract the master is not in any sense the insurer of the safety of his servant. It is the employer's duty to furnish the servant with reasonably safe appliances and buildings and to protect him from such dangers in the performance of his work as in the exercise of ordinary care and prudence can be provided against.

The servant by the terms of his employment is presumed to assume the risk of such injuries from accident or otherwise, as are incident to the nature and character of the employment and against which the master could not in the exercise of ordinary care have protected him.

I say to you further, that no recovery can be had against the master where the cause of the injury, of whatever nature, was unknown to the master, and could not have been known in the exercise of ordinary care. And furthermore, no recovery can be had where the source of danger is known to the servant, and he, without communicating his knowledge to the master, continues in his service. In such a case he is presumed voluntarily to assume the risk, and cannot recover; unless it is made to appear that he informed the master of the facts and continued in his service on the faith of the promise that he would remove the danger by removing the defects.

If you find from the evidence given you in this case that at the time of the alleged injury to the plaintiff the defendant company did not know of the unwholesome and dangerous condition of said building, if it was dangerous, and could not by the exercise of ordinary care have known of the danger thereof, then I say to you that said defendant company would not be liable in this case.

Again, I say to you that if you find from the testimony that the condition of the atmosphere in said building at the time of the alleged injury was unwholesome, and that the plaintiff knew of such fact and voluntarily remained in the employ of the defendant company, he would not be entitled to recover in this case; unless you find from the evidence given you in this case that the plaintiff communicated his knowledge to his superior in the employ of said company, and thereafter continued in the employ of said company under a promise from said superior that said condition should be remedied.

If you find from the evidence given you in this case that the plaintiff knew of the unwholesome condition of the atmosphere in said building and room and remained in the employ of said company with said knowledge, and without the promise upon the part of said company to remedy the defects, he would not be entitled to recover in this action.

If the plaintiff at the time of the alleged injury knew of the unwholesome condition of the atmosphere in said building, he had a right to leave the employ of said company.

If you find from the evidence given you in this case that the plaintiff at the time of the alleged injury notified his superior of the condition of said unwholesome gases, and thereafter remained in the employ of said defendant without any promise on the part of the defendant that it would remedy said condition of unwholesome gases, the plaintiff would be presumed voluntarily to assume the risk of remaining in said unwholesome

gases, and cannot recover in this action for any injury caused by said gases.

Again, I say to you if you find from the evidence given you in this case that the plaintiff knew of the defective condition of said outside door of said building, and of the cold winds blowing therein, and notified his superior thereof, and his superior directed him to cause said door to be fixed, and that plaintiff voluntarily assumed to get said door repaired, and remained in the employ of the defendant without any promise upon the part of the defendant or plaintiff's superior that he would have said remedy perfected, the plaintiff would not be entitled to recover in this action.

The defendant in this case denies that the plaintiff received his injuries or contracted his disease in the building of the defendant.

The defendant claims that if the plaintiff was in fact injured or contracted disease, that he received said injury and contracted said disease in some other place or in some other manner than in the building or in the employment of the defendant.

Now, I say to you if you find from the evidence given you in this case that the plaintiff contracted his disease in some other place or in some other manner than that complained of in the petition, the defendant would not be liable in this action.

In order for the plaintiff to recover in this action he must satisfy you by a preponderance of the evidence that his injuries were received or his disease contracted in the building of the defendant through the negligence of the defendant.

If you find from the evidence that the defendant's company, by its servants managing said business, failed to exercise such reasonable care and caution as men of common prudence and caution situated as they were, and being engaged in such occupation, would have exercised, and that such failure and want of such reasonable care caused the injury to the plaintiff, the defendant is liable, unless you find from the evidence that the plaintiff's own negligence contributed to the injury complained of, or that the negligence of his co-employees, working in the same building with him, caused his injuries.

But, if you find from the evidence that the plaintiff's negligence contributed to his injury, he cannot recover in this action.

The law in this state does not apportion the damages between parties when the joint negligence of both parties causes to one of them an injury. Nor does it permit the plaintiff to recover, although he was less negligent and careless than the defendant. If the injury was the result of the co-operation of concurring negligence of both parties the law permits no recovery.

Then the question arises, was the plaintiff guilty of negligence and want of due care and caution, in what he did which contributed to his own injuries? Could the plaintiff by the exercise of ordinary care, such care as persons of ordinary prudence would have exercised under like or similar circumstances, have avoided the injury? If he could then he is not entitled to recover.

You should take into account the kind of work the plaintiff was engaged in, the manner in which he did it and all the facts and circumstances connected with the case, and then say from all those facts, whether the plaintiff acted as a prudent and careful man under the same or similar circumstances would have acted.

If you find from the evidence given you in this case that the condition of the atmosphere in said building was in fact unwholesome and that the

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plaintiff knew of said fact, was it negligence and carelessness upon his part to remain in said building and atmosphere?

It was the plaintiff's duty to use the same care and caution that men of ordinary care and prudence would have used under like or similar circumstances.

If you find from the evidence given you in this case, that the plaintiff negligently and carelessly exposed himself to unwholesome gases, or negligently remained in a severe draft or wind, and that his own negligence in so doing caused or contributed to his injuries, then I say to you that he could not recover in this action.

And in determining this question you should look to and consider all the evidence which has been given to you upon the trial of this case, the manner in which the plaintiff was at work, the knowledge which he had of the condition of the atmosphere, and all the facts and circumstances surrounding the transaction, and then say from it all whether the plaintiff was guilty of negligence which contributed to his injuries.

Could the plaintiff by the use of ordinary care and prudence have avoided the injury? If he could, he was guilty of negligence; if he could not, then he was not guilty of negligence.

Again, I say to you, if you find from the evidence given you in this case, that the plaintiff did know of the unwholesome condition of said atmosphere, and remained in the employ of the defendant under promise on the part of the defendant or its servants duly authorized, that the defective condition would be remedied, then I say to you that, whether said acts of the plaintiff in continuing to work under such conditions were negligence is a question of fact for you to determine under all the facts and circumstances of this particular case.

Would a man of ordinary care and prudence under the same or similar circumstances, have continued at work under such conditions or would he not?

I leave it as a question of fact for you to determine under all the circumstances of this case, whether the plaintiff was guilty of negligence in continuing to work in said atmosphere, or whether he was not.

And in determining this question, all the facts and circumstances as given to you by the evidence in this case should be carefully considered by you.

If you find from the evidence given you in this case, that the atmosphere in said room was poisonous and unwholesome, and you further find that the plaintiff knew of the fact, but did not know the effect that it would have upon his person or system; before he would be entitled to recover from the defendant on account of the dangerous and poisonous condition of said atmosphere in said building, the effect of which he did not know, he must show by a preponderance of the evidence that the defendant, through its agents and servants, knew, or by the exercise of ordinary care ought to have known of the dangerous effects of said poisonous and dangerous atmosphere upon the system and person of the plaintiff.

The mere fact that the plaintiff knew of the dangerous condition of the said atmosphere, but did not know the extent of its danger upon his system or person, would not give him a greater right to recover against the defendant then, as though he did know the effect that the atmosphere would have upon his system; unless he shows that the defendant through its agents and servants also knew or had reasonable grounds for knowing the dangerous effect of said atmosphere upon the plaintiff's person and

system, and placed the plaintiff there to work with said knowledge on the part of defendant, or with a duty to have said knowledge.

It is admitted on the trial of this case that the defendant, The Cleveland, Lorain and Wheeling Railway Co., was organized and incorporated on or about September 23, 1893, by a consolidation of The Cleveland, Lorain and Wheeling Railroad Co. with The Cleveland, Southwestern Railway Co., and that said The Cleveland, Lorain and Wheeling Railway Co. succeeded to all the rights and liabilities of The Cleveland, Lorain and Wheeling Railroad Co.

It is therefore admitted that if the said The Cleveland, Lorain and Wheeling Railroad Co. was liable for the injuries to plaintiff, that by said consolidation the said The Cleveland, Lorain and Wheeling Railway Co. would be liable in this action if The Cleveland, Lorain and Wheeling Railroad Co. was liable, and not otherwise.

The plaintiff claims that The Cleveland, Lorain and Wheeling Railway Co. is only liable because the said The Cleveland, Lorain and Wheeling Railroad Co. was liable for causing the injury to plaintiff, and the plaintiff further admits if The Cleveland, Lorain and Wheeling Railroad Co. was not liable, then as a matter of course The Cleveland, Lorain and Wheeling Railway Co. would not be liable.

The burden of proof is upon the plaintiff to satisfy you by a preponderance of the evidence that the defendant, The Cleveland, Lorain and Wheeling Railroad Co., was guilty of negligence that he claims directly caused his injuries.

If the evidence is so equally balanced that you cannot determine what the truth is in that behalf, or if the weight of the evidence is in favor of the defendant, the plaintiff has failed to sustain such burden as the law requires and your verdict must be for the defendant.

The defendant in this case claims that the plaintiff's injuries were caused by his own contributory negligence.

That is to say, that the plaintiff's negligence contributed to his own injuries.

Now, I say to you as a matter of law, if you find from the evidence that the defendant company was guilty of negligence which caused the injuries to plaintiff, the burden of proof is upon the defendant to show such contributory negligence on the part of the plaintiff as would defeat a recovery, unless you find that the plaintiff's own testimony, offered in support of his case, raises the presumption of such contributory negligence.

But if you find from the evidence offered by the plaintiff in his support of his cause of action that such evidence raises a presumption of such contributory negligence, then the burden rests upon the plaintiff to remove that presumption by a fair preponderance of evidence.

If you find from the evidence given you in this case under the instructions which I have given you that the plaintiff is entitled to recover in this action he is entitled to recover such a sum as will fairly and reasonably compensate him for the injuries he has received, caused by the negligent act of the defendant, in the particulars complained of, not exceeding the sum of ten thousand dollars, the amount asked for in his petition.

The measure of damages in such a case is compensation, and this properly includes remuneration for all bodily pain and suffering, which the evidence shows in the natural consequence of the injury.

If the plaintiff's ability to perform labor and obtain a livelihood has been impaired by reason of the injuries complained of, that is also a cir-

circumstance which may be considered in determining the amount of damages which he is entitled to recover.

You should look into all the facts and circumstances, and then say what sum will fairly compensate the plaintiff for his injuries, if you find he is entitled to anything.

It is a question for your sound judgment under all the circumstances of the case.

If you find from the evidence that the plaintiff is not entitled to recover, your verdict should be a general verdict for the defendant.

Gentlemen of the jury, in considering this case, you should look to and consider all the testimony which has been given to you in open court, and not thereafter withdrawn from you, should consider it and give it such weight as to you may seem just and proper. You are the sole judges of the weight to be given to the evidence, and of the credibility to be given to the witnesses.

It is the province and the duty of the jury to determine what is and what is not proven in the case, and to pass upon all questions of fact, which are necessary to be passed upon.

This is the exclusive province of the jury, and one with which the court will not and cannot properly interfere or direct.

The findings of the jury upon all the questions of fact, and upon the issues submitted to you, are to be your finding exclusively from the evidence given to you in open court under the charge of the court.

C. W. Johnson and J. H. Leonard, for plaintiff.

J. M. Lessick and E. G. Johnson, for defendant.

The case was submitted to the jury, who returned a verdict for the defendant.

SOLICITING BRIBE.

[Franklin Common Pleas.]

STATE OF OHIO V. JOHN L. GEYER.

1. It is a crime for a member of the legislature to solicit from any person any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment, in any matter pending that might legally come before him.
2. The state is not required in such cases to prove that the money was actually paid or that the accused solicited it for his own personal use, or that it was the only consideration that was to influence him with respect to his official duty.
3. Asking other members of the legislature to support bills and resolutions, collecting and presenting facts and reasons to them and making arguments to induce them to do so, constitute "official action" and the exercise of "official duty" by a member of the legislature.

PUGH, J.

Gentlemen of the jury:—The defendant, John L. Geyer, was indicted by the grand jury. The indictment charges that while he was a member of the legislature he committed the crime of soliciting a bribe. To that indictment he has pleaded not guilty, and thus the charge in the indictment, with his plea thereon, presents for your determination, under the rules of law, the issue now on trial.

Your duty is to decide the questions of fact, including the credibility of the witnesses and the weight to be attached to their testimony. The principal question, as you can see, is whether the defendant is innocent or guilty of the crime charged against him.

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It is my duty to decide, and instruct you upon, all the questions of law, and the instructions on those points it is your duty to obey without dissent or reservation.

In the performance of that duty I will have to inform you what the crime is that is charged, what facts had to be proved to make the defendant guilty, to eliminate and present the true points of inquiry, and to advise you briefly how you may weigh the testimony.

The burden of proving the defendant's guilt rested upon the state. The prima facie presumption is that he is innocent, and that presumption holds good till his guilt is established. To authorize you to return a verdict against him, his guilt, including every fact necessary to constitute that guilt, had to be proved by evidence which excludes from your minds every reasonable doubt.

A greater degree of mental conviction is required in criminal cases than in civil cases.

If you have a reasonable doubt of his guilt, he is entitled to the benefit of that doubt, and an acquittal. But this rule does not signify that the degree of satisfaction and certainty of his guilt which you are required to have to authorize you to convict, must be absolute conviction or certainty. The law only requires that you shall be reasonably and morally satisfied of his guilt. By a reasonable doubt is not meant a strained or whimsical conjecture, but an actual mental hesitation caused either by insufficient or unsatisfactory evidence. A doubt, to justify the defendant's acquittal, must be reasonable, just as the law says; and it must arise from a candid and impartial investigation of all the evidence. It does not mean, as one of the counsel argued, any doubt. I repeat that it means a reasonable doubt.

You have no right to go beyond the evidence to hunt up doubts.

A doubt produced by undue sensibility in your minds and caused by viewing the consequences of a verdict of guilty is not a reasonable doubt.

If, after considering all the evidence, you can say that you have an abiding conviction of the defendant's guilt, you are satisfied beyond reasonable doubt; but, if you do not have such a conviction, then you have a reasonable doubt.

Now, what is the offense charged against the defendant? It is charged that he solicited from William F. Burdell a valuable thing, money. The amount named in the indictment is \$400. But the exact amount is not material or important. He was then a member of the legislature, of the senate, and it is charged that in soliciting the money of Burdell he was actuated by the corrupt intent that it should influence his official action, vote, opinion and judgment as a member of the legislature concerning a certain bill then pending in the senate, the design of which was to authorize the probate court to appoint trust and safe deposit companies, administrators and guardians.

For the purpose of this case it is unnecessary to give any further explanation of the bill.

The law of the state of Ohio makes it a crime for a member of the legislature to solicit from any person any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment, in any matter pending or that might legally come before him. The defendant is accused of violating that law; and whether he is guilty or innocent is the question for you to decide.

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To make out the truth of the charge in the indictment, the state was not obliged to prove even a cent of money was paid to him by, or that he accepted or received a cent of money from Burdell.

The payment of the money is not an element of the crime that is charged against him.

The question is, Did he solicit money? Did he ask for money? Did he invite Burdell to give him money?

The question is not whether the money was paid to him.

It is also true, and it is the law, gentlemen of the jury, that the state was not required to prove that the defendant either desired or solicited it, or asked for it, or invited Burdell to give or pay him money; the fact that it does not appear that he wanted it for his own use, or intended to use it for his own purposes, is a matter of no importance whatever.

If he solicited it, or asked for it, or invited Burdell to give or pay it to him, then the question is: Was it intended by him that it should influence him with respect to his official duty, or to influence his action, vote, opinion or judgment, as a senator, concerning said bill?

Again, I charge you that it was not incumbent upon the state, in making out its case, to prove that the solicitation, invitation, or asking for the money, if that is proved, was the only consideration that was to influence him with respect to his official duty, or his action, vote, opinion or judgment relative to the bill.

He may have been influenced by his own convictions concerning the bill to support it; but, if it has been proved, beyond a reasonable doubt, that he solicited, or asked for money from Burdell, or that he invited Burdell to give or pay him money, with the view of influencing himself in the discharge of his official duty, or to influence his action, vote, opinion or judgment in relation to the bill, the fact that he had been, or was to be, influenced also by his convictions or sentiments concerning the bill constitutes no defense. The law did not demand from the state proof that the solicitation, request or invitation for the money was the sole inducement to any action that the defendant adopted, or was about to adopt, or any vote that he had cast or was about to cast, or any opinion or judgment that he had formed or expressed, or was about to form or express, concerning the bill. Another question of law is, what do the terms "official duty" and action—terms used by the law—mean? What do they include? The term "vote," "opinion" and "judgment," terms also used by the statute, are plain and need no explanation.

But forming or expressing an opinion or judgment in favor of or against this bill, and voting for or against the bill, were not all the acts that the defendant, as a member of the senate, could officially do, or refrain from doing, in relation to it. As a member of the legislature it was competent for him to ask, to induce, other members to vote for it, and to collect facts and reasons and present them to other members for the purpose of inducing them to vote for or against the bill. That would be official action, official duty.

As a member of the legislature he had no right or authority, under the bribery law, or any other law appertaining to his official position, to solicit or ask from any one, or to invite any one to give or pay him, one cent of money, either for himself or any other member of the legislature, as consideration for the exertion by him of any of the official actions which I have explained.

Whatever he did, or was intending to do on these lines, in any of those particulars, he was bound to do as the representative of the public.

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and he had no right to be influenced by any valuable or beneficial thing, except his salary, which was provided for by law. That was his position. That was his obligation.

Now, if you are satisfied beyond a reasonable doubt, by the evidence, that the defendant solicited from Burdell, or asked or invited him to give or pay him money and that he intended to pay it to other members of the legislature to induce them to support the bill, that was a crime, a violation of the bribery statute, and you should, in that case, find him guilty. On the other hand, if you find that he did not do that, you should acquit him.

Only three witnesses testified to the main, the alleged criminal facts in the case, Burdell and Sharp, witnesses for the state, and the defendant. One of the questions which you will have to decide is, whether you will believe the witnesses for the state or the defendant. There is a sharp and direct conflict between their testimony.

Just as all reasonable men in the ordinary walks of life do, you may in this case judge of the testimony of each witness by the manner in which it was given; the opportunity which he had to know the facts about which he testified; the consistency of his testimony with itself, and with all the known or otherwise fully proven facts of the case; and the feeling or bias which he has shown, if any.

You must pass upon the amount of credit you will attach to every fact. That requires you to look at the testimony of each witness in its own light and in the light of the other evidence, and determine whether it is reasonable and probable, or unreasonable and improbable.

In weighing the evidence of these witnesses you may also consider whether either of them has an interest in the case, or an interest in the result of it, in your verdict. Does the evidence show that either of the witnesses for the state has an interest in the conviction of the defendant? or does it show that they were disinterested?

Has the defendant an interest in your verdict? Excepting the interest in his life, can he have any higher interest than that which he has in his own liberty?

Men have been influenced, biased, as witnesses, by their interest in the cases in which they have testified. Witnesses have ever been induced to swear falsely by the interest which they had in the result of the case in which they testified. It is for you to say whether any of the witnesses in this case have been influenced or biased in giving their testimony, by any interest in it, or its result.

A wise rule which jurors may adopt for their guidance, when there is a conflict between the testimony of witnesses, is to give the preference to the testimony of that witness, or those witnesses, who have the least inducement from interest, or other motives, to testify falsely.

If either of the witnesses for the state testified that the defendant said it would be necessary to see certain members of the legislature to get them to vote for the bill and that he would see them, what that meant is a question for your solution. Apply your intelligence and common sense in deciding it.

It would be strange, if in a case like this, the anxiety and zeal of the attorneys should not present to your minds topics which have no pertinence to the issue on trial and no appropriateness in the consideration of "upright, law-respecting and oath-respecting jurors. Such incidents are so usual in criminal trials that one ceases to be startled at their presentation, and yet they are gravely injurious to the cause of law and justice."

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I allude to indirect or direct appeals to the sympathy and commiseration of the jury, to pathetic allusion to the poverty of the defendant.

In a case like this you have a stern duty to perform, and in its performance you have no right to be moved by appeals to the tender emotions of your human nature or by sympathy for anybody.

Certainty, regularity and firmness in the administration of the law by courts and juries are of the highest importance. But it is impossible to have such certainty, regularity and firmness when juries are moved by appeals to the tender emotions of human nature, to the distress of the unfortunate, to sympathy for the helpless, or like considerations.

I say this not to impress you with anything save this, and that is the "solemn and exalted public duty for which you have been selected and designated by the machinery of the law." The duty is as much due to the defendant as to the public.

An argument against the wisdom and justice of the law which was contemplated by the bill and was to give the probate court power to appoint trust and safe deposit companies administrators and guardians was urged upon your attention. That is a matter wholly foreign to the merits of the case, as disclosed by the evidence. It is no part of your province and duty to inquire into the wisdom or justice or merits of the law sought to be enacted by the bill. This trial in no way involves the policy or impolicy, the wisdom or justice of the contemplated law. Therefore, in the consideration of the case upon its merits, you should not allow any of the suggestions of counsel touching the wisdom or justice of the law to have any weight or influence upon your minds. Let them be laid aside as ideas wholly foreign to the issue to be considered and decided.

You must answer the question whether the defendant is innocent or guilty upon the evidence as it was given here from that chair, and according to the law as it is given to you in this charge. It is your inflexible duty to carefully consider the evidence and follow it regardless of consequences. What penalties might be visited upon the defendant in case he is found guilty you are not to consider. You simply pronounce upon that question whether the defendant is innocent or guilty. If he is guilty, he is responsible for it, and not you. If he is innocent, then your verdict should be a shield to him at this time.

Dyer, Williams & Howard, prosecuting attorney and his assistants, for the state.

L. B. Tussing, for defendant.

BRIBERY.

(Franklin Common Pleas.)

STATE OF OHIO V. ABBOT.

A member of the legislature who invites any person to pay money to engage another to appear before a committee to argue for or against a bill, is guilty of soliciting a bribe.

Abbott had introduced a bill in the senate in 1893, making some modifications of the pharmacy law. It then passed the senate, and was defeated in the house. In 1894, he introduced it again in the senate. He worked and argued persistently for it, and it passed the upper house. While it was pending in the lower house the last time Abbott, it is said, solicited some help from constituents of his who were anxious to have

State v. Abbot.

the bill pass. He asked them to raise a purse to defray the expense of getting other persons to appear before the house committee to argue in favor of the bill. The money was not raised, but because of the asking Abbott is convicted of soliciting a bribe. It was not claimed that the money was to be used to influence Abbott to support the bill or work for it.

CHARGE TO JURY.

PUGH, J.

The law of the state of Ohio makes it a crime for a member of the legislature to solicit any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment, in any matter pending, or that might legally come before him. The defendant is accused of violating that law; and whether he is guilty or innocent is the question for you to decide.

To make out the truth of the charge in the indictment, the state did not have to prove that even a cent of money was paid to him, or that he accepted or received any money from Black. The payment of money is not an element of the crime charged. The question is: Did he solicit the money? Did he ask for the money? Did he invite him to give or pay him money? The question is not whether the money was paid to him.

It is also true, and it is the law, gentlemen of the jury, that the state was obliged to prove that the defendant either desired or solicited the money for his own use. If he solicited it, or if he asked for it, or if he invited Black to give it to him, it was a matter of no importance whatever what the defendant intended to do with it, or to what use he was to apply it. If he solicited or asked for the money, if he invited Black to give it to him, the other question is: Was it intended by him to influence himself with respect to his official duty? or to influence his action, vote, opinion or judgment, as a senator, concerning the said bill?

The other question is not whether he was going to apply it to his own individual use. The use to which the money was to be put is a fact which you have to consider as bearing on the questions to be decided; but what I am seeking to impress on your minds is, that the state was not required to prove that the defendant was to have the money for his own private uses.

Again, I charge you that it was not incumbent upon the state, in making out its case, to prove that the solicitation, invitation or asking for the money by the defendant, if that is proved, was the only consideration that influenced him with respect to his official duty, or his action, vote, opinion or judgment relative to the bill.

He may have been influenced by the desires of his constituents, or of other people in the state, as he testified he was, to introduce and support the bill; but if it has been proved that he solicited or asked for money from Black, or that he invited Black to pay him money, with the view to influence his official duty, or to influence his action, vote, opinion or judgment with reference to the bill, the fact that he was also influenced by the desires of his constituents, or of other people, does not constitute a defense. The state was not required to prove that the solicitation, request or invitation for the money was the sole inducement to any action that he adopted, or any vote he cast or any opinion or judgment that he formed and expressed concerning the bill.

If the defendant solicited, or asked for money from Black, or if he invited Black to pay or give him money, and it was done with the intent that he should be influenced with respect to his official duty, or be influenced in his action, vote, opinion or judgment concerning said bill, another question involved is, what do the terms 'official duty' and 'action'—terms used in the statute—mean? What do they include? The terms 'vote,' 'opinion' and 'judgment,' terms also used in the statute, are not ambiguous and need not be elaborately explained.

But casting a vote for or against the bill, or forming and expressing an opinion or judgment in favor of or against it, was not all that the defendant, as a member of the legislature, could officially do, or refrain from doing, in relation to the bill. As a member of the legislature he could argue before the senate; he could collect facts and reasons, and he could present them to the senate, or to the committees of either body, and he could induce other persons to collect facts and reasons and present them to said committee or to the individual members of either body, or to make arguments to said committee in favor of or against the bill. •

If the defendant argued before the senate or before any committee of either the senate or house of representatives in favor of this bill, or if he collected facts and reasons in favor of it, and presented them to either the senate or the committees of either body, or to the individual members of either body, or if he induced other persons to make arguments in its favor before the committees or either of them, or to collect facts and reasons in favor of it, and present them to the committees, or either of them, or to the individual members of either body, that was, in the intendment of the bribery statute, official action.

As a member of the legislature, he had no right—no authority—under the bribery law, or any other law appertaining to his official position, to solicit or ask for one cent of money from any person, or to invite anyone to pay or give him money, either for himself, or for any other member of the legislature, or for any other person, as a consideration for the exercise by him of any of the official actions which I have detailed to you. Whatever he did on these lines, in these particulars, he was bound to do as the representative of the public. That was his position. That was his obligation

BRIBERY.

[Franklin Common Pleas.]

STATE OF OHIO v. W. C. GEAR.

PUGH, J.

Gentlemen of the jury:—The witnesses have testified; the attorneys have discussed the case, and I will now instruct you as to the question or questions you are to determine and the rules of law which are to govern you. After that it will be your duty to determine whether the defendant is innocent or guilty of the crime charged against him.

The crime imputed to the defendant in this case is that of corruptly soliciting a bribe for his official action, vote, opinion or judgment. The gravity of the crime charged is obvious.

Upon your own reflections you can see that if bribery is to affect the official conduct of persons occupying positions of legislative authority, the fair and honest making of laws will be subverted; and if, when such offenses are brought to the attention of court and juries and conclusively

proved, they are allowed to pass without punishment, then direct encouragement will be afforded to the increase and spread of such offenses until their pernicious influence may endanger the very existence of the institutions of the state.

If the evidence on the issue of guilt or innocence is evenly balanced; if it leaves it uncertain which of the two inferences, guilt or innocence, is true; or if it only establishes the probability of his guilt, he should be acquitted. But this rule of reasonable doubt does not mean that the state had to prove the defendant's guilt to an absolute certainty; nor has the defendant or the jury a right to demand from the state that measure of proof.

It is your duty to consider and weigh the facts and circumstances, not separately or distinctly, but massed together; you cannot take up each separately and throw them away because each in and of itself does not establish or disprove the charge in the indictment; but they must be considered together.

In determining the question submitted to you you must pass upon the amount of credit you will attach to every fact. You must do that before you can say whether the facts are sufficient to prove a proposition. That requires you to look at the testimony of each and every witness in its own light and in the light of the other facts. Your opinion does not have to turn upon the number of witnesses who testified on either side. The number of witnesses is a circumstance you are to consider in weighing the evidence; but, as a matter of law, you are not obliged to decide in favor of the side on which there is a large number of witnesses. You should endeavor to concede and harmonize the evidence if you can; when that cannot be done, you must determine for yourselves what portion of the conflicting testimony is most worthy of belief.

You should also consider the relation which any of the witnesses sustain to the transactions involved in the case or to the defendant or the prosecuting witness, and also his interest in the case or in your verdict.

Witnesses may be induced by their interest to swear falsely, and it is for you to decide whether these or either of these witnesses were influenced in giving their testimony by such interest.

You should also consider the probability or improbability of the truth of the statements made by the witnesses. The material, asserted elements of the crime, are: First, the act of soliciting from Flumerfelt, money; secondly, that the defendant in soliciting it was actuated by the corrupt intent to be influenced in respect to his official action, vote, opinion and judgment as a member of the senate.

The first question is: Did the defendant solicit money from Flumerfelt for any purpose? If you find that the language which Flumerfelt says the defendant used was not used at all, that is the end of the inquiry and of the case, and your verdict should be for the defendant, but if you find that such language was used by the defendant, the next question is as to the meaning of the language. Is its meaning innocent or the opposite? If its proper construction is that the defendant was simply expressing the opinion that the committee wanted money or that money would have to be paid to the committee to induce it to report the bill, that cannot be considered a criminal act. But if its proper construction is that the defendant solicited the money from Flumerfelt, and his intention was that the money should influence his official action, it was a crime.

Franklin Common Pleas

It is often a painful duty that juries are required to perform, but the law placed it upon their shoulders and they are bound to stand by it and meet it like men of courage. It is unfortunately too true that there is a weakness in the human organization that will sometimes yield to the inclinations of temptations; even men of the best standing, men of the most insured life, of long and approved integrity and fidelity in all its relations, are found on occasions to yield, to give way, and fall into the admission of crime. It is often this temptation that asserts itself in the commission of crime. It is my duty also to say to you again, that some topics have been urged upon your consideration which have no issue on the trial. I allude to the appeals, to the sympathy and commiseration, to the pathetic assertions of the distress of those who are connected with the defendant. However difficult and painful it may be, it is your duty to promptly, manfully and sternly exclude from your minds all impressions which may have unconsciously found lodgment there by such appeals and allusions.

If you find for the state it must be upon the evidence and the law, and if you find for the defendant it must be upon the evidence and the law; this duty is as much due to the defendant as it is to the state.

In this case the jury brought in a verdict of acquittal.

INSANITY OF PERSON INDICTED.

[Hamilton Common Pleas.]

STATE OF OHIO V. DOMINICK O'GRADY.

1. The law provides that there may be a trial in common pleas court to inquire into the sanity of a person under indictment, and his capacity to present facts to his counsel for defense, in advance of the trial which shall determine whether or not he be guilty under the indictment.
2. Such trial has nothing to do with the prisoner's condition at the time when he is alleged to have committed the crime except in so far as that mental condition may aid the court in the determination of his present condition.
3. In such proceeding a unanimous verdict is not necessary. If three-fourths or more of the jury find the prisoner insane this will authorize the jury to sign a verdict to that effect.

BUCHWALTER, J.

Gentlemen of the jury: You are called here to make inquiry as to the present condition of the prisoner concerning his sanity or insanity. He being under indictment for crime could make the defense of insanity at the trial, but the law also provides that the issue may be raised by his counsel as to whether he was sane at the time when he was put upon trial, as bearing upon his right to confer with counsel, to prepare his case for trial, and to be capable to do it. Therefore, I say, that the law provides that in advance of the trial which shall determine whether or not he be guilty under the indictment, there may be a trial as to his present capacity.

Your verdict, therefore, does not pass upon whether he be guilty or not of crime. You are called upon to simply say whether now he be sane or insane. If he be found to be sane, then there is a right to put him to trial upon the issues raised upon the indictment at once. If he be found to be insane, then it would be the duty, under the law, of the clerk of this court to certify the result of this proceeding to the probate court having jurisdiction in these matters, and it would be the foundation of an order of

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the probate court committing him to the asylum for the insane; and it would be the duty of the keeper of the asylum to securely keep him until either his death or recovery; and upon his recovery to inform the prosecuting attorney of the county of that fact, and then it would become the duty of the prosecuting attorney to issue a capias on which to return him to jail and prepare him for trial.

This is the procedure. And now we pass to the inquiry of his mental condition. We have nothing to do with the condition he was in at the time when he is alleged to have committed the crime, except in so far as that mental condition may aid us in the determination of his present condition.

Is he sane enough to know right from wrong? Is he sane enough to remember the events of his life? Is he sane enough to recall those events and present them to his counsel for the consideration thereof by his counsel? In other words, is he sane enough to present to counsel the facts which ought to be stated and presented to a jury upon the trial of the indictment of murder?

Now, you have heard the testimony from the witnesses as to what they have observed as to his condition while he has been in the jail and in the hospital of the city of Cincinnati. You have heard the opinion of skilled men in that regard as to his condition, as founded upon their observation, and as founded upon the information which they received from those who had him in charge. It is for you to determine on that proof whether he be sane or insane in the manner and in the degree to which I have called your attention.

If he be insane, then your verdict should so state; and the contrary, if such be your opinion. The burden is upon the prisoner to show by a preponderance of the proof that he is insane.

In this procedure a unanimous verdict is not required. It does require a three-fourths number of the jury to find a verdict that he is insane. Nevertheless, I shall submit forms of verdict to you which shall indicate the number of you that may find him sane or insane. If three-fourths or more of you find him to be insane, that will authorize your jury to sign a verdict to that effect—that he is insane.

Owing to what is the apparent condition of the prisoner in court, it has been thought prudent to abridge the hearing, so that it may not be longer than what was requisite to get at the proof in the matter as near as human judgment may arrive at. Now, upon this proof I submit the issue to the jury. You will elect a foreman upon retiring who will sign your verdict for you all.

Thomas F. Shay, for the prisoner.

John C. Schwartz and Thomas H. Darby, for state.

NEGLECT.

[Hamilton Common Pleas.]

ALTEMEIER V. CINCINNATI ST. RY. CO.

1. Whether the conduct of a person and that of the railway company shows such person to have been a passenger is a question for the jury.
2. Where the evidence shows the relation of carrier and passenger the law imposes upon the former the "highest degree of care" as distinguished from ordinary care.

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3. It is a reasonable and necessary rule that a higher degree of care should be exercised toward a child incapable of using discretion commensurate with the perils of the situation than one of mature age and capacity.
4. Before the jury can find negligence in the speed of the car or failure to sound the gong at the crossing it must be determined that the act or omission was the cause of the inquiry in controversy.
5. It is the duty of a railway company at a crossing, used as such by the public and recognized as such by the company, to keep in mind the right of pedestrians on that crossing, and its duty to observe the rights of its own patrons who are under the necessity of using that crossing in going from its cars to their destination.
6. In arriving at the total amount of damages to be awarded under the statute, for wrongful death, the jury should consider the pecuniary injury to each separate beneficiary, not found guilty of contributory negligence.
7. As to beneficiaries who may be found guilty of contributory negligence, no damages should be awarded on their account, and the jury should find in its verdict which of the beneficiaries were guilty of such contributory negligence.

SMITH, JR., J.

Gentlemen of the jury:—The plaintiff, Herman Altemeier, administrator of the estate of Albert Altemeier, deceased, complains of the Cincinnati Street Railway Co., a corporation under the laws of the state of Ohio, in this, that the defendant company, on November 1, 1893, caused the death of said Albert Altemeier, alleged to be a minor between twelve and thirteen years of age, by the negligence of said company and of its servants in the operation of its cars at a crossing in Avondale, in this county. It is also alleged that Albert Altemeier, deceased, was a passenger upon the car of defendant company, and left surviving him his father, Herman Altemeier; his mother, Wilhelmina Altemeier; William Altemeier, Edward Altemeier, Joseph Altemeier, brothers, and Katie Altemeier, a sister, next of kin, and that by reason of the death, that these, his parents and brothers and sisters, were damaged in the sum of \$10,000. The claim is, then, that the defendant company, by its negligence, caused the death of Albert Altemeier.

To this petition the defendant files an answer, amounting to a general denial of the allegations in said petition. As I have before told you, negligence has been defined to be the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or the doing something which a prudent and reasonable man would not do. In other words, it is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or the doing what such a person under the existing circumstances would not have done; and contributory negligence is such negligence as the evidence may show the injured party himself was guilty of, which directly contributed to his injury. It is, therefore, necessary for you to determine in this case by whose fault or negligence the accident happened.

It is claimed that deceased was a passenger upon said defendant's car. A passenger is one who has taken a place on a public conveyance for the purpose of being transported from one place to another. Anyone may become a passenger by applying for transportation to a carrier of passengers. The relation of carrier and passenger can be created by the exhibition of a bona fide intention on the part of a passenger. It is, therefore, for you to say from the evidence in this case whether or not the deceased was a passenger, whether or not his conduct and that of the railway company shows him to have been a passenger.

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If the jury believe from the evidence that the deceased was a passenger upon the car of the defendant, then it was the duty of the defendant, with a view to secure the safety of its passengers, to exercise the highest degree of care towards said deceased as distinguished from ordinary care and by the term "highest degree of care" the court means all the care and diligence possible in the nature of the case; and if while a passenger, if you find deceased to have been such, and without any fault on his part, the said deceased was injured, and said company did not exercise the highest degree of care towards said deceased, then said plaintiff is entitled to recover.

But if you find from the evidence that said deceased, although a passenger at the time of the injury, was guilty of contributory negligence which was the approximate cause of the injury, then I charge you that plaintiff can not recover, although said defendant did not exercise the highest degree of care towards the deceased.

If, however, you find from the evidence that deceased was not a passenger when injured and if deceased undertook to cross the street at this crossing, if there was a crossing there, then the defendant company is charged with the duty of exercising, in the operation of its cars and in the management of the same, only ordinary care—such care as men of ordinary prudence are accustomed to exercise under such circumstances.

The use of the streets for railways is allowed only because it is considered not to be a substantial interference with their free and unobstructed use as highways for passage. So long, therefore, as there is no unreasonable interference with the public right of passage, railways in streets are lawful structures. The care that one may give may be but ordinary, and yet the circumstances may require that greater or less personal attention, having greater danger connected with it, and yet they would in a thing which may require but little attention; he may be safe, and others with whom he may come in contact may be safe, by the exercise of but little personal attention to the thing done. He may, on the other hand, be at something else that may reasonably and prudently require much greater attention, having greater danger connected with it, and yet they would in both cases be but the exercise of ordinary care. In determining whether the defendant was negligent, and also whether such negligence caused the injury and death of Albert Altemeier, you should consider all matters bearing upon the subject which the court has permitted to be given to you in the testimony. You should consider the speed of the car, the north bound car and the south bound car, at or near the crossing, the character of the travel upon the crossing at that place and time, as to whether the gong was sounded or not, and such matters as have been brought out before you in the evidence.

But before you can find negligence in either of these matters referred to, which is pertinent to the issue before you, you must determine that such omission of duty, if it was omitted, was the cause of the injury in controversy. Although you may be of opinion that the car may have run swiftly, and that it was negligent to so run it, yet, before that becomes a factor in this controversy, you must satisfy your mind also, that by that act, injury was caused to the deceased, otherwise it would have no pertinency whatever to the issue; and the same may be said with regard to such other acts or omissions as above mentioned. Considering all these matters, and considering them separately or in conjunction, as you may

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find from the proof they did occur or did not occur, you should say from them all whether there was a want of ordinary care in the operation of the car which directly caused the injury to Albert Altemeier. If you are satisfied by a preponderance of the proof that there was such negligence, and that the death was caused by reason of such negligence, and without the contributing fault of the boy, then your verdict in that respect should be for plaintiff.

The burden is on the defendant to have satisfied you of the contributing negligence of the boy, unless the plaintiff, in producing the various testimony on his behalf, has offered testimony which, in your judgment, tended to show negligence upon the part of the boy. If he did, if there is such testimony tending to show negligence causing the death of the boy as given in the testimony by plaintiff, then the burden is upon plaintiff to first acquit his cause and overcome by other proof such evidence tending to show negligence upon the part of the boy.

If the place of the accident was a crossing used as such by the public and recognized as such by the company, it was the duty of the company to keep in mind the right of pedestrians on that crossing, and its duty to observe the rights of its own patrons who were under a necessity of using that crossing in going from its cars to their destination.

In the application of the doctrine of contributory negligence to children in actions by them or in their behalf for injuries occasioned by the negligence of others, their conduct should not be judged by the same rule which governs that of adults; and while it is their duty to exercise ordinary care to avoid the injuries of which they complain, ordinary care for them is that degree of care which children of the same age, ordinary care and prudence, are accustomed to exercise under similar circumstances.

It is a reasonable and necessary rule that a higher degree of care should be exercised toward a child incapable of using discretion commensurate with the perils of the situation than one of mature age and capacity. Children, wherever they go, must be expected to act upon childish instincts and impulses.

In determining the question of care or negligence on the part of the Altemeier boy, it is the duty of the jury to consider his age as you may find it from the proof (the father, I believe, testified he was between twelve and thirteen years of age); to consider what prudence and care a boy of ordinary prudence ought reasonably to have exercised and would be accustomed to exercise under the circumstances of like age. You are not to judge him, then, with that rule as to prudence that you would if he were much younger or if he were a man, but use your experience in life and adjudge the boy's conduct according as boys of that age of ordinary prudence ought and reasonably would act under all the circumstances in proof.

An accident, gentlemen of the jury, is where neither person is at fault. If you should find neither to be to blame, and that it was one of those occurrences which human foresight in the exercise of ordinary prudence would not have discovered and avoided, then there can be no recovery.

If you find in favor of the defendant, that is, if you fail to find by a preponderance of the proof that the boy was killed by reason of the negligence directly contributing thereto by the railroad company, or if you find that the boy contributed to his own death by his own carelessness, then there can be no recovery.

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If you find in favor of the defendant, your verdict will be simply for the defendant.

If you find in favor of the plaintiff, then it becomes your duty to assess the amount of recovery.

The plaintiff claims damages in the sum of \$10,000. That is the limit which the statute permits in any such recovery. But, gentlemen of the jury, if you find in favor of the plaintiff, you are to assess what the damage appears to be from the proof before you. The proof sets forth the respective brothers and sisters and the father and mother, giving the ages of a part if not all of them.

In arriving at the total amount of damages to be awarded under the statute, the jury should consider the pecuniary injury to each separate beneficiary (not found guilty of contributory negligence), but return a verdict for a gross sum.

As to any beneficiaries whom you may find guilty of contributory negligence, no damage should be awarded on their account, and the jury should find in its verdict which, if any, of the beneficiaries were guilty of such contributory negligence. The sole right of recovery is pecuniary. There is no compensation to be permitted to enter into the verdict for the bereavement of the next of kin or of the parents; nor for the loss of society of such person, nor for the pain and suffering, either of them in their grief for, or of him who was killed. But it is your duty to consider what reasonably and probably would be the pecuniary benefit, if any, to the father and mother, the brothers and sisters, or next of kin in the event he had lived, except such as you may find guilty of contributory negligence. It is your duty then to consider the prospects of the boy. There is no specific testimony on this, and it would not be permitted to offer any proof to undertake to say to you in dollars and cents what that damage would be. The law leaves it to the just judgment of the jury to be swayed by no other considerations than that of undertaking to make up a just estimate that you may place upon pecuniary advantage, the advantage in money, that it would have been to this family had this boy not been killed by this car.

Gentlemen, take the case.

[The jury found for the plaintiff in the above case, and assessed his damages at \$4,000.]

COMMON CARRIERS.

(Clinton Common Pleas.)

B. & O. R. R. CO. v. FISHER & SON.

1. A railroad company, as a common carrier, is bound to furnish cars for the transportation of freight, and it must have control of its cars in order to perform its duties to the shipping public. It may, therefore, make and enforce reasonable rules and regulations to secure the prompt unloading of its cars.
2. Where a number of railroad companies, by mutual agreement, enter into a car-service association, and such association adopts such reasonable rules and regulations, it is the same in effect as if each company for itself had adopted the same.
3. A rule or regulation requiring consignees, on receiving notice of the arrival of cars, to unload the same within four days thereafter, or pay the delivering company \$1 per car per day, for all the time over said period of four days that such cars shall remain on the tracks of said company without being unloaded, is a reasonable rule or regulation, and, therefore, legal and valid.

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4. Before such rule or regulation can be enforced against a particular consignee, it must be shown that he had knowledge of it, and that the cars, on their arrival, were placed on the side tracks of the company in suitable and convenient places for unloading, and were so kept for the full period of four days.
5. But a car need not be kept for said period in the same spot or place on the side track. If, in receiving other freight and removing unloaded cars, it becomes necessary to shift the position of a car awaiting unloading, such shifting will not relieve the consignee from the duty of unloading in the four days, provided the car, after shifting, is left in a convenient place for unloading.
6. If a car is placed and kept in a suitable place for unloading for the four days prescribed by the rule, and the consignee fails to unload it, he will be liable for car-service thereafter though the car may not at all times be in a convenient place for unloading, provided he is not thereafter unreasonably hindered and delayed in unloading.
7. But if a car is shifted from day to day and from place to place, and is not at any time, for the full period of four days, in a suitable place for unloading, the company cannot recover car-service therefor.

CHARGE OF THE COURT.

VAN PELT, J.

Gentlemen of the jury: It is admitted by the pleadings in this case that certain cars loaded with coal and coke and consigned to said defendants, were received at this place at the times stated in the petition and were the same cars for which plaintiff is now claiming service.

Taking this fact as admitted, the issues joined between the parties in their pleadings impose upon the plaintiff, before it can recover in this case, the burden of proving by a preponderance of the evidence:

First—That said defendants were notified or had actual knowledge of the arrival of said cars, and failed to have the same unloaded for more than four days after being thus notified or learning of their arrival. If this fact is not shown as to some one or more of these cars, plaintiff cannot recover. But if it is shown, then plaintiff must go further, and prove:

Secondly—That said plaintiff company was at the time operating its railroad and shipping merchandise over its lines under a rule or regulation applicable to shipments to this place requiring those to whom such shipments were made, on learning of their arrival here, to unload the same from the cars, within four days thereafter, or to pay to the delivering company \$1 per car per day for all the time over said period of four days that such cars should remain on the tracks of the company without being unloaded.

Is the existence of such a regulation at that time shown by the evidence?

If you find that some time before these shipments a number of the railroad companies doing business in this part of the country, including the plaintiff, The Baltimore & Ohio Railroad Co., had formed or entered into a car-service association, and that such association, in order to secure the prompt unloading of cars, had adopted such a rule or regulation, this would be the same in effect as if the plaintiff company had itself adopted the same.

And if you find that such a rule or regulation was then in force and applicable to shipments to this place, including shipments of coal and coke, then, if such rule or regulation was reasonable, that is if it imposed no unreasonable burden or restriction upon those receiving shipments here, it was legal and valid, and may be enforced by the company.

It is a well-settled rule of law in this state, that a railroad company, as a common carrier of freight, may make and enforce all reasonable

rules and regulations for the convenient transaction of business between itself and those dealing with it as shippers or consignors.

A railroad company as a common carrier is bound to furnish cars for the transportation of freight, and it must have control over its cars in order to perform its duties to the public. If persons to whom shipments of goods and merchandise were consigned, might hold the cars without unloading, at their pleasure or convenience, and without extra costs or charges, and thus deprive the railroad company of the use of its cars for the transportation of other freight, it is very evident that both the railroad company and the shipping public would suffer serious injury and loss. The right, therefore, of a railroad company to make and enforce reasonable rules and regulations to secure the prompt unloading of its cars is clear.

Whether a particular rule or regulation is or is not reasonable in its requirements, is, when the facts are shown, a question of law for the court, and not a question of fact for the jury. And I now say to you that the time allowed for unloading, four days, was a reasonable time, and that the amount charged (\$1) per day, for each day over the period of four days, is not excessive, and that the rule or regulation in question, if you find that such a rule or regulation is established by the evidence, was a reasonable one, and is valid in law.

If the existence of such a rule or regulation is not shown, the plaintiff cannot recover, for it bases its right to recover upon such a rule or regulation. But if such a rule or regulation is shown, and that it was applicable to shipments to this point, and that the defendants on the arrival of said cars were notified or obtained actual knowledge of the fact and failed for more than four days to have the same unloaded, yet, before plaintiff can recover it must appear that the defendants had knowledge of such rule or regulation at the time, and it must also be shown by a preponderance of evidence that the cars on their arrival were placed and kept upon the side track of the company in suitable and convenient places for unloading the same by wagons and teams.

When a car arrived, it was the duty of the servants of the company to place the same in a convenient place for unloading, and if they failed to do so, the period of four days allowed for unloading would not begin until such car was placed in a convenient and proper place to be unloaded.

And when a car was once put in a suitable place for unloading, it was the duty of the servants of the company to keep it so located for the four days' time provided for unloading; and if they failed to do so, the company cannot recover for car service for such car under the rule, until the same is placed in a convenient place for unloading, and kept in such a place for said period of four days.

In saying that a car must be placed and kept in a convenient place for unloading for said period of four days, I do not mean that a car must be kept in the same spot or place on the track during all of said period of four days.

If, in receiving other cars from day to day, and in removing cars that have been unloaded, it becomes necessary to shift the position of a car awaiting unloading upon the side tracks of the company, such shifting or changing of position will not prevent the company from recovering for car service if the car is not unloaded within the four days, provided the car is, after such shifting, left in a suitable and convenient place for unloading.

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But, if the car is shifted in its position from day to day, and on some days is in a suitable place for unloading, and on other days not, and is not at any time for the full period of four days kept in a suitable place for unloading, the company can not recover from the consignee car service under the rule on account of his failing to unload such car within the period of four days for unloading.

The consignee is entitled to have the car placed and kept in a convenient place for unloading for the full period of four days prescribed by the rule before he can be held liable for car service on account of his failing to unload within that time.

But if a car is placed and kept in a suitable place for unloading for the full period of four days, and the consignee fails to unload the same within that time, he will be liable for car service after that period, although the car may not at all times thereafter be kept in a convenient place for unloading unless the servants of the company thereafter unreasonably delay him in unloading by placing the car in unsuitable places and keeping the same there longer than reasonably necessary to enable them to accommodate other shippers and to receive and remove other cars in the transaction of other business. If, however, after the period of four days, the consignee is unreasonably delayed and hindered in the unloading of the car, the company can not recover service for any day on which he is thus hindered and delayed.

Again, it is the duty of a railroad company, operating under such a rule or regulation, to provide at each of its stations where such rule is in force, side tracks sufficient in number and extent to accommodate its business at such stations, and to enable its servants to place and keep cars accessible for purposes of unloading. And if such sufficient side tracks are not provided, and because of the want thereof, the servants of the company are unable to keep cars in places convenient for unloading for the period prescribed by the rule, the company can not recover car service for cars left without being unloaded longer than that time.

If a consignee, on being notified or learning of the arrival of a car, takes or sends a wagon or wagons with the necessary help for unloading the car, and on arriving at the track finds that the car is not in a suitable place for unloading, he is not required to keep his wagon and hands waiting while the company may be shifting cars upon its tracks, or until the car may be placed in position where it may be unloaded. And the company cannot recover car service for any day on which the consignee is thus hindered in unloading, nor can any day on which he is so hindered be counted as a part of the period of four days allowed for unloading, unless the time occupied is of such short duration as to constitute no substantial hindrance to the work of unloading.

I have now, as I believe, stated all the rules of law applicable to the plaintiff's claim for car service under the rule upon which it asserts its right to recover. I have only stated the law applicable to the different questions arising upon the pleadings and the evidence in relation to this claim, and it is for you to determine from the evidence what the facts are, and whether the plaintiff is or is not entitled to recover under the rules of law as I have stated them.

If you find in favor of the plaintiff upon his claim you will ascertain the number of days for which it is entitled to recover as to all or any of the cars received, and allow it for the total number of days, at the rate of \$1 per day; and this amount, with six per cent. interest from September 29, 1894, would be the amount of your finding in favor of the plaintiff.

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But if you find that the plaintiff, upon the evidence, and under the rules of law which I have stated, has failed to prove any fact or facts essential to its right to recover, your verdict as to the claim of the plaintiff will be in favor of the defendant.

I come now to the claim of the defendants for damages as set out in their answer herein.

Said claim in substance is that said cars, when they arrived at the station here, were not so placed as to be accessible for unloading for a long time after their arrival, and that when they were so placed they were not allowed to remain, but were shifted from place to place, at some times wholly inaccessible, and at other times accessible, only at great disadvantage and loss of time to men and teams, and that by reason of such neglect, inaccessibility of cars and unnecessary and unreasonable delay, defendants sustained damages in loss of time and extra expense incurred in the sum of \$20.

All the allegations of defendants' answer on which said claim for damages is founded, are denied by plaintiffs in their reply to said answer.

Upon this claim for damages the burden of proof is cast upon the defendants.

When said cars arrived, defendants were entitled to have the same put within a reasonable time at such places as would be convenient and accessible for unloading, and to have the same kept at such places for a reasonable time to enable them to unload said cars.

In order for the defendants to recover upon their claim for damages, the burden is on them to show by a preponderance of the evidence the following facts:

First—That the servants of the company neglected to place and keep said cars in places conveniently accessible for a reasonable time for unloading the same.

Second—That because of said neglect defendants were unreasonably and unnecessarily hindered and delayed in unloading said cars. And,

Third—That by reason of such hindrance and delay, and the leaving of such cars in places inaccessible for unloading, defendants sustained damages in loss of time and extra expense. You will look carefully to all the evidence relating to these points. If you find that all of the above facts are established by the evidence, then you will find in favor of defendants on this issue, and will award them such damages as the evidence may show that they sustained in loss of time or extra expense by reason thereof, not exceeding the amount claimed in their answer.

But if defendants have failed to show any fact or facts essential to their right to recover such damages your verdict will be against defendants upon this issue.

Now, gentlemen, you are the sole judges of all questions of fact and as to the weight of the evidence and the credibility of the witnesses. In determining the weight and credit to be given to the testimony of any witness you should consider the manner of the witness in testifying and his demeanor while on the witness stand; the opportunities which such witness may have had to know the truth concerning matters about which he testifies; the interest which any witness may have in the result of the case; the interest, feeling or prejudice which any witness may have shown in favor of or against either party to the suit; these and all other facts

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which, in your judgment, affect the weight and credit to be given to the testimony of each and all of the witnesses; and after carefully weighing all the evidence return such verdict as you shall find warranted by the evidence under the law as given you by the court.

Verdict for plaintiff.

Hayes & Swain, for plaintiff.

West & Walker, for defendant.

RAILROAD CROSSINGS.

[Stark Common Pleas.]

JACOB MOULDER V. CLEVELAND, CANTON AND SOUTHERN R. R. CO.

1. When the tracks of two railroads cross each other at a common grade or level, the trains or engines passing over such tracks must come to a full stop not nearer than two hundred feet, nor further than eight hundred feet from the crossing, and shall not cross until signalled so to do, nor until the way is clear.
2. When two passenger or freight trains approach the crossing at the same time, the train on the road first built shall have precedence, if the tracks are main tracks over which all passenger trains and freights of the road are transported.
3. If one of the trains approaching the crossing is a passenger and the other a freight train, the passenger train would have precedence.
4. And regular trains on time take precedence over trains of the same grade not on time, or having no schedule time.

MCCARTY, J.

Gentlemen of the jury: This action is brought by the plaintiff, Jacob Moulder, against the Cleveland, Canton and Southern Railroad Co., for the purpose of recovering damages which he alleges he has sustained by reason of the alleged negligence of the defendant, the Cleveland, Canton and Southern Railroad Co.

He sets forth in his petition, in substance, that the Cleveland, Canton and Southern Railroad Co. is an incorporated company, under the laws of the state of Ohio, and on November 17, 1893, owned and operated a railroad known as the Cleveland, Canton and Southern railroad, with the tracks, cars, locomotives and other appliances thereto belonging; that a part of said railroad extended from the city of Canton, in this county, to Sherrodsville, in Carroll county, and that it had a branch road extending from said main line through and to the village of Minerva, and that said branch crosses the railroad track of the Lake Erie, Alliance and Southern railway at or near the town of Minerva; and at which crossing there was a target for signal purposes; and that on said November 17, 1893, the plaintiff was riding in the caboose of a work train on the Lake Erie, Alliance and Southern railway, and was an employee on said train and road; that on the morning of said day, while said plaintiff was in said caboose on said train, as aforesaid, and while said work train on said Lake Erie, Alliance and Southern railway was going south through the town of Minerva, and when crossing the track of the defendant at said town of Minerva, the defendant carelessly and negligently caused one of its locomotives and train of cars to be hacked into the said train on the Lake Erie, Alliance and Southern railway, at said railroad crossing, on which the plaintiff was, and without giving any signal, and when the target was so set as to notify said defendant's employees and train men not to cross said crossing, as the

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train on the Lake Erie, Alliance and Southern railway was crossing, and had the right of way to cross, and at a time when the same could be easily seen; and thereby said defendant caused its train of cars, so carelessly and negligently operated as aforesaid, to run into said caboose in which said plaintiff was riding on said Lake Erie, Alliance and Southern railway, and with such force and violence as to throw the caboose from the track, and thereby the plaintiff received severe, painful and permanent injuries to his person, by the breaking of three ribs, a puncture and injury to his left lung, and injuries to his spine, together with cuts and bruises about his person, and from which injuries he alleges that he has suffered great pain, and is a constant sufferer therefrom; and that said injuries are of a permanent character, and that he will always be afflicted with pain, and able to do but little, if any work. That said defendant caused its train of cars to be passed over said track of the Lake Erie, Alliance and Southern Railroad Co., at said crossing at Minerva, at said time when plaintiff received his injuries, as aforesaid, carelessly and negligently, and when said train on which said plaintiff was riding on the Lake Erie, Alliance and Southern railway had the right to said crossing, and when the target at said crossing had been so placed to notify said defendant's employees, so running said train, not to cross said crossing; and that thereby plaintiff received said injuries without any fault or negligence on his part, but by reason of the carelessness and negligence of the defendant in its operation and the running of said train of cars on said road, as aforesaid; and that he has sustained damages growing out of said injuries.

The plaintiff further alleges that at the time of said collision on November 17, 1893, the employees of the said Lake Erie, Alliance and Southern Railway Co. so placed said target as to notify the defendant and its employees that its train was passing over the road of the defendant at said crossing, and said defendant's employees so carelessly and negligently operated said train of cars, and paid no attention to said signal and target at said crossing, and did not stop its train within two hundred feet thereof nor over eight hundred feet from said crossing, but crossed the same without being signalled by any watchman or person in charge of said target, and before the way thereof was clear, and while said train was passing over, as aforesaid, and by means of the premises, and the negligence and carelessness of the defendant in the operation and running of said engine and train over said crossing and into said train in which said plaintiff was a passenger, the plaintiff received the injuries set forth in his petition; and he claims damages in the sum of ten thousand dollars.

Now, that is a statement of the claim made by the plaintiff as to his cause of action against the defendant.

To this petition, thus stated, the defendant has filed an answer, in which it admits that at the time named in the petition it was an incorporated railway company, duly incorporated under the laws of the state of Ohio; and that a part of its railroad extended and still extends from the city of Canton, Stark county, Ohio, to Sherrodsville, Carroll county, Ohio; and that it had a branch road extending from said main line to the village of Minerva; that said branch crossed the track of the Lake Erie, Alliance and Southern railway near the town of Minerva, and that there was at said crossing a target to be used for signal purposes. The defendant denies that said plaintiff was injured at the time stated in said petition by reason of any negligence upon the part of the defendant, or any of its employees. The defendant denies that the train on the Lake

Erie, Alliance and Southern had the right to the crossing at the place specified. It denies that said target was set so as to give to the Lake Erie, Alliance and Southern train the right to said crossing. And the defendant further says that it has no knowledge of the injuries complained of in the petition; but avers that if said plaintiff was injured it was either by his own carelessness or the carelessness of the Lake Erie, Alliance and Southern Railway Co. and not the carelessness of the defendant. And the defendant denies each and every other allegation contained in the petition which is not admitted in its answer.

To this answer the plaintiff has filed a reply which is a general denial of all the averments contained in the answer which do not admit the averments of the petition.

So that these pleadings, the petition, the answer and the reply, set forth the claims made respectively by the parties to this suit.

The facts alleged in the petition which are denied in the answer, and the allegations of the answer which are denied by the reply, form the issues in this law suit. What I mean by the issues are the allegations affirmed on side and denied on the other, the matters in dispute. There are some matters about which there is no dispute. These you will simply take as facts. One is, that the Cleveland, Canton and Southern Railroad Co. was, on the day when the accident is alleged to have occurred, viz.: November 17, 1893, the owner, and was operating its railroad on its branch from the junction to Minerva. Another is, that the Lake Erie, Alliance and Southern at the same time owned, and was operating its railroad from Alliance through Minerva, and at or near Minerva these two railroads cross each other at a common level.

Another fact about which the evidence on each side tends to establish is that on the morning of November 17, 1893, the two trains collided on that crossing. The evidence tends to show that the train on the Lake Erie, Alliance and Southern was a work train, consisting of a locomotive, a coal car and a caboose, not being run by any schedule time, but running and having run, for some days before the collision, about that time in the morning. The evidence also tends to show that the train on the Cleveland, Canton and Southern was the regular morning passenger train, consisting of a locomotive, a baggage car, a smoking and a passenger car, and was about on its schedule time. The evidence tends to establish also that the said train on the Lake Erie, Alliance and Southern road was on the crossing going over it, and had all passed over except the caboose, when the train on the Cleveland, Canton and Southern railroad, defendant's road, was backing down from the station at Minerva, and ran or backed on the crossing and against the caboose of the Lake Erie, Alliance and Southern train, and that the plaintiff was riding in that caboose, and was by that collision injured.

The evidence also tends to show that the Cleveland, Canton and Southern road was the older road. All of these are matters about which you will doubtless have but little difficulty in reaching a conclusion.

The plaintiff claims further that at the time of the collision the target was and had been properly set to show that the Lake Erie, Alliance and Southern train had the right of way over the crossing, and that it was rightfully moving across with its train when the collision occurred.

The defendant claims that the Lake Erie, Alliance and Southern was wrongfully on the crossing; that the defendant was the older road; that its train approaching the crossing was a regular passenger train and was

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entitled to the right of way; and that its employees did not know, and could not know by the exercise of reasonable care, that the Lake Erie, Alliance and Southern train was about to or was crossing the railroad crossing at the time stated, in time to see it so as to avoid the collision. That the Lake Erie, Alliance and Southern did not raise the target in time so defendant could see it in time to avoid the collision, if, indeed, it raised it at all.

I will say to you that by the laws of this state when the tracks of two railroads cross each other at a common grade or level, the trains or engines passing over such tracks shall come to a full stop not nearer than two hundred feet nor further than eight hundred feet from the crossing; and shall not cross until signalled so to do, nor until the way is clear; that when two passenger or freight trains approach the crossing at the same time, the train on the road first built shall have precedence if the tracks are main tracks over which all passenger trains and freights of the road are transported (and in this case you will find that both the tracks were main tracks.) There is no claim made by either party that either of these tracks was a side track; while one is a branch track no claim is made that it was a side track, or other than the main track of the branch). If one of the trains approaching that crossing is a passenger train, and the other is a freight train, the passenger train would have precedence; and regular trains on time shall take precedence over trains of the same grade not on time. So that in this case, if the train on the Lake Erie, Alliance and Southern road consisted of an engine, tender, coal car and caboose, and the train on the Cleveland, Canton and Southern road consisted of a passenger train, such passenger train would have precedence; and if the train on the defendant's road was on time, and the train on the Lake Erie, Alliance and Southern road was not on time, or had no schedule time, the train on the defendant's road in that event also would have precedence: unless the signal target stood perpendicularly; and if it stood perpendicularly that was notice to the defendant that the crossing was about to be or was being occupied or used by the Lake Erie, Alliance and Southern railroad; and in such case, the defendant should have stopped its train until the other passed over and the target resumed a horizontal position. And if the target stood perpendicularly before and when the collision took place so that the defendant's employees saw it, or could have seen it by the exercise of ordinary care on their part, in time to have stopped the train—in time to have avoided the collision—if it did not do so, it was guilty of negligence.

I will say further that whether the target stood perpendicularly or horizontally, if the employees of the defendant saw the train of the Lake Erie, Alliance and Southern road, or could by the exercise of reasonable care on their part have seen it in time to have stopped its train so as to have avoided the collision, and did not do so, it was guilty of negligence in that regard, and would be liable for the injury.

But if the defendant had the right of way on any of the grounds I have stated, and did not know, and could not by the exercise of reasonable and proper care have known that the Lake Erie, Alliance and Southern road was occupying or was about to occupy the crossing until it was too late to stop in time to prevent the collision, and was running at a reasonable and proper rate of speed, then the defendant would not be liable for any injuries received by the plaintiff.

The plaintiff's right to recover in this action, if he has a right to recover at all, depends on whether the defendant, the Cleveland, Canton and

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Southern Railroad Co., was guilty of the negligence charged in the petition. If it was not guilty of such negligence, then the plaintiff cannot recover, however severely he may have been injured.

Negligence is the want of exercise of that degree of care which ordinarily prudent persons are accustomed to exercise under like or similar circumstances.

The defendant was required to use that reasonable degree of care to avoid injury as was commensurate with the danger, in view of all the circumstances surrounding the parties at the time, that degree of care which ordinarily prudent persons would have exercised with trains of cars approaching that crossing at that time.

The plaintiff was also bound, on his part, to use all reasonable care for his own protection and safety : and if he could, after becoming aware of the danger, have saved himself from injury, it was his duty to do so ; and if he could have avoided the injury by the exercise of ordinary care on his part, and did not do so, he cannot recover.

These two trains of cars were not both entitled to occupy or use that crossing at the same time. One or the other, if a collision occurred, was there wrongfully. One of them had the right of way under the law, and the other had not.

The plaintiff claims and the defendant likewise claims, that when the target stood horizontally that the defendant was entitled to use the crossing ; and that when the target stood vertically or perpendicularly the Lake Erie, Alliance and Southern was entitled to use it, if it was changed to that position at a proper time, so that it could have seen it in time to have notice that the other train was occupying it. And that, as the Cleveland, Canton and Southern was the older road, it claims that it was entitled to use it at all times when not in use by the Lake Erie, Alliance and Southern.

I will say to you further that if both trains were within eight hundred feet of the crossing, and both approaching it, the train on the older road, under the law, would have the right of way ; and if the defendant's road was the older road it was entitled to the use of that crossing under the statute ; and the Lake Erie, Alliance and Southern was bound, under the law, to stop until the defendant had passed over. Likewise, if the defendant's train was a regular passenger train, and the other was not a regular passenger train, it should have stopped until the defendant's train had passed over ; and if its agents or employees knew that the defendant's train was within eight hundred feet, and was approaching that crossing, or could have known it by the exercise of ordinary care on its part, and did not stop until the defendant's train had passed over, it was guilty of negligence.

If you find from the testimony that the collision in question was the result of the wrongful act of both the Cleveland, Canton and Southern Railroad Co. and the Lake Erie, Alliance and Southern Railroad Co., and the plaintiff was injured by such concurrent wrongful act of both companies, then the plaintiff might, at his election, sue one or both of said companies. and may maintain this action against the defendant sued for the injury or injuries sustained by him, on proof showing that the defendant was guilty of negligence on its part concurring with the negligence of the Lake Erie, Alliance and Southern Railroad Co. in producing the injuries complained of. But if the accident was the result of

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negligence on the part of the Lake Erie, Alliance and Southern Railroad Co. alone, the plaintiff cannot recover in this action.

The burden of establishing the negligence on the part of the defendant, either alone or concurrently with the other company, and that such negligence produced the injuries complained of, is on the plaintiff. And in such case, if the plaintiff was free from negligence on his part, and if the evidence shows that the defendant was guilty of such negligence, he will be entitled to such damages as you may find from the evidence he has sustained.

If you find from the testimony that the defendant was not guilty of negligence, which, either alone or with the negligence of the Lake Erie, Alliance and Southern Railroad Co. produced the collision causing the injury, then and in that event your verdict should be for the defendant. But if the evidence shows that the defendant company was guilty of negligence on its part, which, either alone or with the negligence, if there was negligence, of the Lake Erie, Alliance and Southern Railroad Co., caused the injury, then you should find, on these issues, in favor of the plaintiff; and you will then go forward and determine what damages the plaintiff has sustained, if any.

To determine the amount of damages, should you find that the plaintiff is entitled to damages under the evidence and under the instructions I have given you, you will determine from the evidence the extent of the injury or injuries he then received; whether they were permanent or otherwise; his bodily or mental suffering, if he suffered; the length of time, if you should so find that the plaintiff was confined to his bed or his house by reason thereof. In making this estimate of damages you should also determine whether the plaintiff since that time has been less able on account of said injuries to follow his usual occupation or any ordinary occupation requiring labor, and whether he will continue to be less able to follow his occupation; and from what his present occupation is, and what he is now able to do and earn, and from all the facts and evidence on the subject, determine the amount of damages that the plaintiff ought to recover, if any.

You should determine the issues in this suit as though the case were between two individual persons. The fact that the one party is a railroad corporation should have no weight with you in determining the facts in the case.

If, from all the evidence in the case, under the instructions I have given you, you find the issues in favor of the plaintiff, and that he has sustained damages as charged in his petition, then to enable you to estimate the amount of such damages it is not necessary that any witness should have expressed an opinion as to the amount of such damages; but you yourselves may make such estimate from the facts and circumstances in evidence, and by considering them in connection with your own experience, knowledge and observation in the business affairs of life, as will fairly compensate him for this injury.

In determining the issues submitted to you, you should, as I have no doubt you will, honestly and earnestly endeavor to arrive at the truth in this action.

If, under the testimony and under these instructions, you find for the plaintiff, you will assess his damages at such sum as you may deem reasonable, not exceeding, however, the amount claimed in the petition.

If you find for the defendant you will return a verdict for the defendant generally.

Welty & Taylor, for plaintiff.

Baldwin & Shields, for defendant.

MURDER—CONSPIRACY—EVIDENCE.

[Stark Common Pleas Court.]

STATE OF OHIO V. SARAH SNELL.

1. Malice does not necessarily mean ill-will or hatred toward the person injured. It is evidenced by an act or by acts which spring from a wicked motive, attended by circumstances indicating a heart regardless of social duty and bent on mischief.
2. The word "aid," as used in the statute, means to help or assist or strengthen; the word "abet" means to encourage, counsel, incite or assist in a criminal act; and the word "procure" means to persuade, to induce, to prevail on, to cause, to bring about.
3. It is not enough that one prosecuted as a principal, under the statute, for aiding, abetting or procuring another to commit a crime, should merely have known before its commission that the principal intended to commit the crime, nor would knowledge coupled with consent that the crime be committed be sufficient to convict such accessory as a principal. The jury must be satisfied beyond a reasonable doubt that such accessory advised, hired, incited, commanded or counseled, so as to have been effective, the principal to commit the crime.
4. A conspiracy is a combination of two or more persons by some concert of action to accomplish some criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means.
5. Where a person is prosecuted as principal, charged with a crime committed as the result of a conspiracy, the state must prove beyond a reasonable doubt that conspiracy was entered into by and between such person and others charged in the indictment and that such person did, through the agency of such conspiracy, procure, bring about, compass or effect the crime with which such person is accused.
6. The jury will be justified and required to consider a reasonable doubt as existing if the material facts, without which guilt cannot be established, may be fairly reconciled with innocence. But when a full and candid consideration of the evidence produces a conviction of guilt, and satisfies the mind to a reasonable certainty, a captious or ingenious artificial doubt is of no avail.
7. A petition in a civil action is competent evidence in the prosecution of one of the parties for murder, to show that such an action was pending at the time of the commission of the crime and to show the grounds for the action as stated in the petition, but should not be considered as any evidence of the truth of the statement it contains.
8. Instruments in writing, letters and telegrams are also competent, but only as tending to throw light on the conduct and as bearing upon the guilt or innocence of accused.
9. The testimony of an accomplice in crime should be very cautiously received and suspiciously scrutinized by the jury. It would be unsafe to convict upon the uncorroborated testimony of an accomplice.
10. Any declaration or statement of the accused which is admitted in evidence should be carefully scrutinized, lest the language of the witness be substituted for that of accused, and for the further reason that they may have been imperfectly heard, defectively remembered or inaccurately related by the witness detailing the same.
11. Circumstantial evidence is admissible under our laws to prove the guilt of accused but it can only be conclusive where every necessary link in the chain of circumstances is proved beyond the existence of a reasonable doubt.

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12. Testimony tending to show the physical and mental condition of the accused, during the period when the conspiracy to commit a crime is alleged to have existed, is admissible only as tending to establish insanity, and where accused makes no such defense, and does not claim to have been unable to distinguish between right and wrong, such testimony should be ignored.

CHARGE TO JURY.

MCCARTY, J.

Gentlemen of the jury: This is the action of the State of Ohio against Sarah Snell, who was jointly indicted with James C. Wiggins and Dr. W. Brown by the grand jury of Wayne county, Ohio, at the February term, 1894, of the court of common pleas of that county, for the crime of shooting one William A. Mackey with intent to kill him, and also in another count in the indictment with shooting said William A. Mackey with intent to wound him the said William A. Mackey.

The indictment charges that James C. Wiggins, Dr. W. Brown and Sarah Snell, late of said county, on November 20, 1893, with force and arms, at and in the said county of Wayne and state of Ohio, with a certain pistol then and there loaded with gunpowder and one leaden ball, which said pistol they, the said James C. Wiggins, Dr. W. Brown and Sarah Snell in their right hand then and there had and held, with intent then Mackey did unlawfully, maliciously and purposely shoot with intent then and there and thereby him the said William A. Mackey to kill, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio.

The second count in this indictment charges that the said James C. Wiggins, Dr. W. Brown and Sarah Snell, late of said county, on November 20, 1893, with force and arms, at and in said county of Wayne, and state of Ohio, with a certain pistol then and there loaded with gunpowder and one leaden ball, which said pistol they, the said James C. Wiggins, Dr. W. Brown and Sarah Snell in their right hand then and there had and held, one William A. Mackey did unlawfully, maliciously and purposely shoot with intent then and there and thereby him, the said William A. Mackey, to wound, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio.

The indictment charges the same criminal act in two counts. One shooting with intent to kill; and the other shooting with intent to wound. You will have the indictment with you in your jury room, and can read it in detail.

You will observe that this indictment charges three persons jointly with the commission of this alleged crime. Under the law each may be tried separately, and each, if guilty, may be convicted. This investigation is to determine the guilt or innocence of the defendant, Sarah Snell, alone.

To this indictment, the defendant, Sarah Snell, has pleaded "not guilty." And that plea of not guilty puts in issue every material allegation in the indictment, and casts upon the state the burden of proving the guilt of the defendant, as she stands charged in the indictment, beyond the existence of a reasonable doubt.

These material allegations in the first count in the indictment, are, that James C. Wiggins, Dr. W. Brown and the defendant on November 20, 1893, at and in the county of Wayne, Ohio, with a certain pistol then and there loaded with gunpowder and one leaden ball, did unlawfully,

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maliciously and purposely shoot one William A. Mackey with intent then and there and thereby him the said William A. Mackey to kill.

And these material allegations in the second count in the indictment are that James C. Wiggins, Dr. W. Brown and the defendant on November 20, 1893, at and in the county of Wayne, Ohio, with a certain pistol then and there loaded with gunpowder and one leaden ball, did unlawfully, maliciously and purposely shoot one William A. Mackey with intent then and there and thereby him the said William A. Mackey to wound.

The statute defining this crime provides that whoever maliciously shoots another person with intent to kill, wound or maim such person, shall be imprisoned in the penitentiary not more than twenty years nor less than one year.

It is also provided by the statute that whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he or she were the principal offender.

This indictment, charging as it does that the defendant with the others named in the indictment did unlawfully, maliciously and purposely shoot the said William A. Mackey with intent to kill, has in it, as a necessary element to be proved, that the shooting was done maliciously, that is, with malice—which means the doing of a wrongful act intentionally, without just cause or excuse—that state of mind which prompts a conscious violation of the law to the prejudice or injury of another.

Malice does not necessarily mean ill-will, or hatred toward the person injured. It is evidenced by an act or acts which sprung from a wicked motive, attended by circumstances indicating a heart regardless of social duty and bent on mischief. Malice is said to be express when the cruel act is done with deliberate mind, with a settled and formed purpose. This kind of malice is generally evidenced by the circumstances preceding and attending the transaction complained of, or by threats, menaces, former grudges, lying in wait, concerted schemes to do injury, or by an unusual degree of cruelty attending the act.

Malice is implied when the unlawful act done is sudden and without any great provocation, and also where the act done necessarily shows a depraved heart, as the giving of poison and the like.

The first count charges that the shooting was done with intent to kill Mackey. The state must then prove beyond a reasonable doubt that the defendant shot Mackey with the intention of killing him, before the defendant would be guilty under that count.

The second count charges that the shooting was done with intent to wound Mackey. The state must then prove beyond a reasonable doubt that the defendant shot Mackey with intent to wound him in his body or limbs, before she would be guilty under the second count.

I have said to you that the state must prove beyond a reasonable doubt that the defendant shot Mackey with intent to either kill or wound him, before it can convict the defendant.

By this I do not mean and the law does not require that the defendant, Mrs. Snell, should have with her own right hand held the pistol, and fired from the pistol the bullet that struck Mackey in the back part of his neck or head.

Persons participating in the commission of a crime do so either as the principal offenders or as those who aid, abet or procure the commission

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ot the crime. A principal offender is the one who is the immediate perpetrator of the criminal act.

The word "aid" means to help or assist or strengthen; the word "abet" means to encourage, counsel, incite or assist in a criminal act; and the word "procure" means to persuade, to induce, to prevail on, to cause, to bring about. And whoever aids, abets or procures another to commit any offense may be prosecuted and punished as if he or she were the principal offender.

The state does not claim that Mrs. Snell did the physical act of shooting Mackey. It claims that Brown did the shooting; but that Mrs. Snell procured Wiggins to cause the life of Mackey to be taken, and that Wiggins, as his part of that conspiracy or unlawful enterprise, procured Brown, either for money offered him or promise to him by Wiggins, or through fear from threats made to him by Wiggins, that he, Wiggins, would kill him or kill the members of his family if he did not take the life of Mackey, and that Brown was thereby procured or induced by Wiggins to shoot Mackey, with intent to kill him. And if you should find from the evidence, beyond a reasonable doubt, that the defendant, Mrs. Snell, procured Wiggins to cause the life of Mackey to be taken, and Wiggins as his part of that conspiracy procured or caused Brown to do the shooting, with that intent, and that Brown did shoot Mackey at the time and place charged in the indictment, in furtherance of that conspiracy, with intent to kill him, then Mrs. Snell would be as guilty of the crime charged as if she herself had fired the shot that struck Mackey.

But if she did not procure Wiggins to cause Mackey to be shot, or procure Brown to shoot Mackey, she cannot be convicted, no matter what Wiggins or Brown did.

It is not enough that Mrs. Snell should have merely known before the time of the shooting that Wiggins intended to cause Mackey's life to be taken—nor would knowledge on her part coupled with consent that the shooting should be done be sufficient to constitute the crime charged against her; but before you can return a verdict of guilt against her you must be satisfied beyond a reasonable doubt that she advised or hired or incited or commanded or counseled said Wiggins, so as to have been effective in influencing him or causing him to procure or bring about the shooting of said Mackey.

If the defendant procured Wiggins to cause Mackey to be shot, and Wiggins did procure Brown to do the shooting, and he, Brown, did it, it is not necessary to a conviction of the defendant that she ever saw or heard of Brown before the shooting was done.

It is proper that I should define conspiracy. I will say to you that a conspiracy is a combination of two or more persons by some concert of action to accomplish some criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means.

Before the defendant in this case can be convicted of the offense with which she stands charged in the indictment, the state must prove beyond the existence of a reasonable doubt that a conspiracy was entered into by and between her and the other defendants charged in the indictment to unlawfully, purposely and maliciously shoot one William A. Mackey at or about the time charged in the indictment, and with the intent charged therein; or that she entered into such conspiracy with the

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defendant, James C. Wiggins, who thereafter, in pursuance of said conspiracy, procured one Dr. W. Brown to so shoot said William A. Mackey. That is to say, before the defendant can be convicted of the offense with which she stands charged in the indictment, you must find beyond the existence of a reasonable doubt that she did procure, bring about, compass or effect through the agency of said Wiggins and Brown, the shooting of William A. Mackey as charged in the indictment.

The accused cannot be lawfully convicted unless the evidence establishes her guilt beyond a reasonable doubt. What is a reasonable doubt?

A verdict of guilt can never be returned without convincing evidence. The law is too humane to demand a conviction while a rational doubt remains in the minds of the jury. You will be justified and required to consider a reasonable doubt as existing if the material facts, without which guilt cannot be established, may be fairly reconciled with innocence. In human affairs absolute certainty is not always attainable. From the nature of things reasonable certainty is all that can be attained on many subjects.

When a full and candid consideration of the evidence produces a conviction of guilt, and satisfies the mind to a reasonable certainty, a cautious or ingenious artificial doubt is of no avail.

You must look then to all the evidence, and if that satisfies you of the defendant's guilt you must say so.

But if you are not fully satisfied, but find only that there are strong probabilities of guilt, the only safe course is to acquit.

If, from a full consideration of all the testimony given by the state and the defendant on the subject of the conspiracy claimed by the state to have been entered into by and between Mrs. Snell and Wiggins, you are satisfied beyond a reasonable doubt that Mrs. Snell advised or hired or incited or commanded or counseled said Wiggins in such manner as to influence him or cause him, Wiggins, to procure or bring about the shooting of said Mackey, then whatever was done or said by Wiggins and Brown in furtherance of that conspiracy would, in law, be the act and declaration of Mrs. Snell, and testimony tending to show what was done by Wiggins and Brown in the carrying out of that conspiracy, and as tending to show that Wiggins procured Brown to shoot Mackey, if he did shoot him, may be considered by you as bearing upon the question of the guilt or innocence of the defendant.

You will determine from the evidence whether or not Brown shot Mackey on or about November 20, 1893, in Wayne county, Ohio.

If Brown shot Mackey, did Wiggins procure or cause him to do it? Did Mrs. Snell procure Wiggins to cause Mackey to be shot?

In determining whether Mrs. Snell procured Wiggins to cause Mackey to be shot, you will inquire what motive, if any, she had in wanting Mackey shot. Had she a divorce suit pending with her husband, brought by Jacob Snell against her and Wiggins? What relations, if any, did Wiggins sustain to her? Was Wiggins charged in that divorce suit with improper relations with her? Did Mrs. Snell believe Mackey was an important witness against her in that cause? Was Mackey's life insured in such manner that Mrs. Snell believed she would be the beneficiary in case of Mackey's death, or did she cause Mackey's life to be insured for the benefit of her daughter, Mrs. Mackey, and did she cause the

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policy to be assigned to her so that she might take care of it for her daughter?

Was she simply, as she claims, on unfriendly relations with Mackey because he married her daughter? Had she on that account disinherited her daughter? Did she afterwards relent and conclude to make provision for her daughter by causing the policy of insurance to be issued on Mackey's life? Was that policy taken out in good faith for the benefit of her daughter?

Certain documentary evidence was introduced on the part of the state. The petition of Jacob Snell against his wife and others for divorce, alimony and an injunction to prevent the disposal or incumbrance of his wife's property was allowed to go to the jury for two purposes, only; the one as tending to show the fact that such an action was pending between them at the time this alleged crime was committed—the other as tending to show the grounds for the action as stated in the petition; but you will not consider it as any evidence of the truth of the statements contained in it.

Also a petition of Mackey against Mrs. Snell, Wiggins and Brown was admitted to show the pendency of that action, and what was claimed as the grounds of the action, and that may be considered by you only as tending to show the pendency of such action, and the grounds thereof, as set forth in the petition.

Also the petition in the case of Mrs. Snell against her husband, Wiggins, and Mackey, and this was admitted as tending to show the claim she had made against them, but not as evidence of the truth of the claim.

The state claims that this action of Mrs. Snell against her husband, Mackey and Wiggins was a mere pretense, having no real ground for action in it, but brought for the purpose of forming the basis of a settlement on her part with Mackey, whereby she was to convey certain property to Mrs. Mackey, and there bring about a reconciliation between herself and Mackey.

Also the paper purporting to contain the terms of a settlement between Mrs. Snell and Mackey, and a deed to Mrs. Mackey for certain property, has been offered in evidence. These papers must not be considered by you for the purpose of in any way contradicting or impeaching the testimony of Mackey, but only as tending to throw light on the conduct of the defendant, Mrs. Snell, as bearing upon her guilt or innocence of the offense charged in this indictment. You will determine what weight they should have. Certain letters and telegrams have been admitted in evidence. You will give to them such weight as you believe they are entitled to in the determination of the guilt or innocence of the defendant. The policy of insurance I have mentioned on the life of Mackey in favor of his wife, and the assignment or transfer of the same to the defendant, are also in evidence. Also the transcript of the case of Wiggins against Martin is in evidence.

I want to call your attention to the testimony of Dr. W. Brown, who was jointly indicted with the defendant and Wiggins.

He testified that he did the shooting of Mackey, and he is now serving a term in the penitentiary of the state for the part he took in that transaction. He admits and testifies that he was an accomplice in the commission of that crime. I call attention to his testimony for the purpose of saying that the testimony of an accomplice in crime should be very cautiously received, and should be suspiciously scrutinized by the jury,

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It would be unsafe to convict the defendant upon the uncorroborated testimony of Brown, as to any fact necessary to be proved to establish the guilt of the defendant. Does the testimony of other witnesses corroborate him? Do the circumstances proven in the case corroborate him?

You will determine in the light of all the testimony and circumstances in the case what weight should be given to his testimony. In the light of all of the testimony on the subject, determine whether Brown shot Mackey, and, if he did shoot him, with what intent did he do so? Was it with intent to kill him or to wound him?

In determining the question as to whether Wiggins procured Brown to shoot Mackey, you will ascertain from the testimony what Wiggins did, if anything, in furtherance of the commission of the crime, and in this connection you should consider what efforts he made, if any, to procure others to commit the same offense. Did he send Shaffer from Indiana to commit the crime? Did he furnish Brown a vial of poison with which to poison Mackey? Did he furnish the revolver to Brown with which the shooting was done? Did he accompany Brown part of the way from Indiana to where the shooting was done?

From all that he said and all that he did, as shown by the testimony, you will determine whether or not he procured or caused Brown to shoot Mackey.

Any declaration or statement of the defendant, Mrs. Snell, which has been admitted in evidence should be received by you with caution and should be carefully scrutinized, lest the language of the witness be substituted for that of the defendant, and for the further reason that they may have been imperfectly heard, defectively remembered, or inaccurately related by the witness detailing the same.

I should also call your attention to the fact that certain testimony has been given tending to show that the defendant and Wiggins sustained adulterous relations with each other. I will say in relation to this that even though the proof should satisfy you beyond a reasonable doubt that she and Wiggins did sustain such relations with each other—this would not justify you in finding the defendant guilty of the crime with which she stands charged in the indictment, unless the proof further satisfies you beyond the existence of a reasonable doubt that she is guilty of the offense of procuring, either directly or through the instrumentality of James C. Wiggins, the shooting of William A. Mackey by Dr. W. Brown, in the manner and form set out in the indictment.

In this case the state seeks to establish the fact of conspiracy against the defendant, by what is known as circumstantial evidence. Circumstantial evidence is admissible under our law to prove the guilt of the defendant, but this kind of evidence can only be conclusive where every necessary link in the chain of circumstances from which the deduction of guilt is sought to be drawn is proved beyond the existence of a reasonable doubt; and if any fact or circumstance in the case necessary to be proved in order to draw the deduction or inference of guilt against the defendant is not proved beyond the existence of a reasonable doubt, then the jury would not be justified in returning a verdict of guilty; for where the circumstances are reconcilable upon the theory of the accused's innocence, or where there are not sufficient facts proved beyond the existence of a reasonable doubt from which the jury may safely draw the inference of guilt, the only prudent course to pursue would be to acquit the defendant.

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No inference can be drawn against the defendant in this case from the fact that the court permitted the acts and declarations of the alleged co-conspirators of this defendant, done and said in her absence, to be given in evidence against her. The only effect of this action of the court is to make the fact of conspiracy a necessary ingredient in the crime charged against the defendant in the indictment, and before you can convict her of the offense with which she stands charged you must find, independent and uninfluenced by any finding of the court in this case, the fact of conspiracy to commit the offense charged in the indictment, and this you must find beyond the existence of a reasonable doubt.

The state claims that the circumstances relied on by it to establish the guilt of the defendant are not reconcilable on any other theory than that of the guilt of the defendant, and it claims that each and every circumstance is reconcilable on the theory of the guilt of the defendant.

The defendant claims that each and every circumstance claimed by the state to show the guilt of the defendant is reconcilable with her innocence, that her acts and declarations, her letters and telegrams, all related to business transactions, and to nothing else.

That the telegrams claimed by the state to be in cypher she claims meant what they said, that when she said "proceed east of here," she meant to proceed east to some little town and take care of some claim for which she was liable with Wiggins for the care of a horse; and so with the others, that they related to real business transactions, and had no relevancy to the shooting of Mackey, or the commission of any other criminal act.

You will have all these letters and telegrams with you in your jury room, and you should read them, and in the light of the testimony and the circumstances in evidence determine the meaning the parties intended to convey to each other thereby, and give to them such weight as they should have in the determination of the guilt or innocence of the defendant.

Testimony has been introduced on the part of the defendant tending to show that before the alleged commission of the offense charged in the indictment she sustained a good character for peace, quietness and morality. You will consider this testimony bearing on the defendant's good character in these respects, as you consider other evidence in the case, and give it such weight, and only such weight, as you believe it would have in the determination of the guilt or innocence of the defendant.

Testimony has been introduced tending to impeach the general reputation of the witness Charles Hizer for truth and veracity, and also tending to show that his general reputation for truth is good.

I will say to you that if you believe said witness knowingly testified falsely to a material fact, you are at liberty to discard his testimony altogether; but the credibility of witnesses is a subject for your consideration and decision, and you should give the testimony of each witness such weight, and only such weight, as you think it deserves.

In determining what weight to give to the testimony of Charles Hizer you will take into the account his age, his appearance on the witness stand, his manner of testifying, the character of the persons called to testify against his general reputation for truth, the character of the person called to sustain him, the means that they all had of information on the subject of his truthfulness, and from all of it determine what weight should be given to his testimony.

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Some testimony was admitted tending to show the physical and mental condition of the defendant during the period when the state claims that she was engaged in the conspiracy to procure the shooting of Mackey. Counsel for the defendant stated during the argument that they do not claim that during said period she was insane, or that she was in such mental condition as that she did not know right from wrong. I will therefore say to you that you need not consider that testimony given on the subject of her mental condition for any purpose.

Such testimony is only admissible as tending to establish the defense of insanity, and as the defendant does not claim that she was insane, or that she did not know right from wrong at the time the alleged conspiracy is claimed to have been made and carried out, you will therefore give the question of her mental condition no consideration, but confine your investigations as to whether or not she is guilty of the crime charged against her in the indictment.

In this case the state has introduced evidence tending to show that the defendant in the spring of 1893 secured a policy for \$10,000 upon the life of William A. Mackey in favor of her daughter as beneficiary, and that she thereafter caused the same to be transferred by her daughter to her. This, the state claims, is a criminating circumstance and furnishes at least one of the motives which it claims actuated the defendant in the commission of the alleged offense. The defendant, on the contrary, has introduced testimony tending to show that in the taking out of said life insurance policy upon the life of said William A. Mackey, and in having it transferred to herself, she acted in good faith and with the sole intention and purpose of providing for her daughter, Mrs. Mackey, in case of the death of said William A. Mackey before that of the said Clara Mackey.

I will say to you, as a matter of law, if you find from the evidence introduced upon that subject that the defendant did act in good faith in taking out the said policy of insurance upon the life of said William A. Mackey, and in having the policy transferred to herself, that then and in that event her acts in so doing could not furnish any motive for the commission of the offense charged against the defendant in the indictment, and in that event you should not consider the conduct of the defendant in taking out said life insurance upon the life of said William A. Mackey and having it transferred to herself, in determining the issue as to whether or not the defendant is guilty of the offense with which she stands charged in the indictment. You will determine how this is from the proof.

As I have said, you will have all of the papers, letters and telegrams that have been offered in evidence with you in your jury room. They are all proper items of evidence to be considered by you along with the other testimony in the case.

The paper purporting to contain the terms of a settlement between Mackey and Mrs. Snell will be before you. If actions were pending in good faith between said parties, and were in good faith settled between them, as set forth in that paper, and nothing more was done or intended to be done or accomplished by that so-called settlement, then such paper would not be evidence of any statement or confession against the defendant. You will determine how this is from the evidence and circumstances in the case.

You are the sole judges of the facts. The court cannot determine the facts for you, and I have purposely avoided going over the testimony in detail, upon either side. You will remember it all, weigh it all, con-

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sider and apply it all, and from it all determine the guilt or innocence of the defendant.

If, in the determination of the many legal questions which have arisen during the trial, I have been unfortunate enough to have seemed to lean toward one side of the other, this should have no possible effect on your minds in reaching a conclusion from the evidence.

You will receive what I have said to you as the law of the case, as such; and from the testimony, in the light of these instructions, determine the question whether the defendant is or is not guilty of the crime charged in the indictment.

If you find from the testimony, in the light of those instructions, beyond a reasonable doubt, as I have defined reasonable doubt:

First—That the defendant, Sarah Snell, advised or hired or incited or commanded or counseled said Wiggins so as to have been effective in influencing or causing him to procure or bring about the shooting of said Mackey by Dr. W. Brown;

Second—That such shooting was done unlawfully, purposely and maliciously;

Third—That such shooting was done with intent to kill said Mackey; and

Fourth—That such shooting was done in Wayne county, in the state of Ohio.

It will be your duty to find the defendant guilty as she stands charged in the first count in the indictment, and not guilty as she stands charged in the second count in the indictment.

But, if you should fail to find anyone or more of these propositions in favor of the state, then your verdict should be not guilty—unless you should find the other proposition in favor of the state, and that the shooting was done with intent to wound, and was not done with intent to kill; in that event you should find the defendant not guilty as she stands charged in the first count in the indictment, but guilty as she stands charged in the second count in the indictment.

If you find the defendant not guilty of either shooting with intent to kill or with intent to wound, you will return your verdict of not guilty.

Gentlemen, you have listened very patiently to this long trial. The case is an important one—important to the state, and important to the defendant. It has been very carefully and ably tried and argued on both sides, and it now remains for you, aided as you are by the arguments of counsel, from the testimony in the light of the instructions I have given you, to determine the guilt or innocence of the defendant, Mrs. Snell.

I trust, and have every reason to believe, that you will give this case that just, patient, careful and impartial consideration its importance demands. If the defendant is guilty, say so by your verdict. If she is not guilty, say so by your verdict.

You will do your duty in the light of the evidence and the law, irrespective of the consequences either to the state or to the defendant.

You will, upon retiring, appoint one of your number foreman. I will have proper forms of verdict sent you which you can readily adapt to your finding. Having agreed upon a verdict, have your foreman sign it, and bring it with you into court.

You may retire.

HUSBAND AND WIFE—CHILDREN.

[Lucas Common Pleas Court.]

EDWARD QUIGLEY V. MICHAEL H. MURPHY.

1. Under an agreement of separation in which both father and mother reserve to themselves all rights and privileges as parents, with provision that children are to have a present home with a third party, are never to be permitted to have a home with a step-parent, and the mother agreeing not to remove the children from the custody of the third person without consent of the father, the latter has the right to remove the children from such custody at any time without consent of the mother or such third person.
2. A father having placed children in the custody of a third person, with agreement to pay a certain sum for board and care of such children, without provision as to clothing, is nevertheless liable to such third person for such clothing as was necessary, reasonable and fit for such children and was not furnished by him.
3. The clothing that was reasonable, fit and suitable for such children is what the children of other parents in like situation in life and like financial ability usually have.
4. The father's liability to such third person, under agreement for board and care of his children, is not terminated by mere notice that he will no longer be responsible for such board and care; his liability continues so long as he allows the children to remain in the custody of such third person, unless it appears that the latter refused to deliver the children, upon the father's demand, or interfered with his taking them away.
5. It is the duty and obligation of the father to provide reasonably for the support of his minor children, if he be of ability to do so, but the necessary and proper amount and kind of care, clothing and support, are, under ordinary circumstances, left to his sole discretion, subject to the rule that such discretion must not be abused to the injury of the children.
6. Where the father, being able, neglects or refuses to provide for his children, so as to render it necessary that some other person should so provide or care for them, then the law implies a promise or obligation on the part of the father to pay for the proper amount and kind of care, clothing and support of his minor children.
7. The duty of a father toward his minor children is not affected by an agreement of separation with his wife, no matter what causes the separation or by whose fault it was produced; it is not the policy of the law to deprive children of their right to support and culture on account of difficulties or dissensions between their parents.
8. In determining whether a father's discretion has been properly exercised, all the conditions and circumstances under which the children were placed, their age, their health and physical condition, the manner in which they have been accustomed to live, and the care which they had before received, and the character of the place to which they are to be taken, its method of treatment of children, everything in fact which would affect the comfort, health and physical well being of the children, and their prospects for happy and useful lives, should be considered.
9. A place having been selected by the father for the care and support of his children, under the discretion vested in him, the presumption is that the place is a suitable one, and the burden is upon those claiming adversely to show that it is not under the rules above stated.
10. If such place is not a suitable one, and the infants are of such tender age as not to have the ability or judgment to act for themselves, their mother has the right to remove them to some proper place and provide for their support and maintenance until the father shall provide suitably.
11. And under such circumstances, for the reasonable expense of doing so, the father is liable to the person who furnished the means, care and support at the request of the mother.

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12. Where it appears that upon agreement of separation between husband and wife, the children, placed in a convent by the husband, were subsequently removed therefrom by the wife, with notice to the husband, and that the latter frequently visited the children at the home of a third person, where the wife had placed them, and had full means of knowing the character of the support given them, and made no objection, there is an implied promise on his part to pay the reasonable value of the board, clothing and care so furnished.
13. And the fact that the mother told the father that she was providing for the support of the children, and that he would not be called on to make payment for same, unless brought to the knowledge of the third person having the care and maintenance of such children, does not affect such implied promise.
14. The amount of compensation which such third person is entitled to receive is not governed or limited by the father's prior agreement with another party, where he himself placed the children, but the reasonable value of the board, care and clothing so furnished.

PRATT, J.:

Gentlemen of the Jury: The plaintiff in this case, Edward Quigley, brings this action against the defendant, Michael H. Murphy, and seeks to recover from said defendant, the father of two children alleged in the petition to be of the ages respectively one of ten years in August, 1894, and the other of seven years in February, 1894, for the board, nursing, care, clothing and medicines which he claims that he furnished to the defendant's said children during a period of two hundred and twenty weeks, between December 31, 1889, and May 1, 1894; and plaintiff asks for judgment against the defendant for the sum of \$2,200 and interest from May 1, 1894. The petition in which plaintiff sets forth his claim alleges that Claudia Q. Murphy is the wife of the defendant Murphy, and the mother of the children in question. That on or about December 31, 1889, the defendant and his said wife entered into an agreement, by the terms of which they were to live separate and apart, but neither to forfeit any right as regards their children, and that such children should have their home with the plaintiff and his wife. It is also alleged that the defendant agreed that the plaintiff should be paid \$5 a week for their board. The petition also alleges that the defendant entirely neglected and failed to furnish the necessities of life—the necessary clothing, care, nursing or medicines for these children, and that by and with the authority of the defendant's wife—Claudia Q. Murphy—acting for and on behalf of her husband, he did during two hundred and twenty weeks supply the said children with their board and other necessities of life, to wit: Care, clothing and medicine, and he alleges the value of the boarding, clothing and medicines to be \$10 per week.

The defendant files his answer to the petition—which is designated as the second amended petition in the case—and the one on which the claim now under consideration is being tried, and he answers it denying each and every allegation in the petition except as to certain matters which he admits; and it is proper that I should call your attention to the matters which he admits in his answer, because whatever is admitted by one party or the other you take as being conceded by him, and therefore not necessarily in issue. After this general denial, the admissions that he makes are as follows: That he is the father of the two children in question, and that Claudia Q. Murphy is the wife of the defendant. He further admits that on or about December 31, 1889, the said defendant entered into an agreement with his wife, Claudia Q. Murphy, under and by the terms of which they were to live separate and apart, and that said contract in no way changed the rights of either of said parents as to

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their said children; and he further admits that it was further contracted by the terms of said agreement that the children should temporarily, and for no fixed or stated time, have their home with the plaintiff and his wife, Eliza Quigley.

He further says that after the making of said agreement between the defendant and his wife, Claudia Q. Murphy, and on or about January 1, 1890, this defendant left his children with the plaintiff, who agreed to board them for the sum of \$20 per month. That under and in pursuance of said agreement between plaintiff and said defendant, said children remained with the plaintiff for a little over two months, until on or about March 5, 1890, and then he alleges that, "On or about March 5, 1890, this defendant, with the full knowledge, acquiescence and consent of the said Claudia Q. Murphy, placed his children in the Ursuline Convent of the Sacred Heart in the city of Toledo, Ohio, and arranged for their remaining in said convent permanently; that said convent is a Catholic institution, and that said defendant and his wife are both members of said church; that at said convent said children were well and properly cared for and educated; that said convent was in every respect a proper place for said children."

Then he further alleges that some time afterward, to wit: On or about April 2, 1890, the plaintiff and the said Claudia Q. Murphy, acting in conjunction with said plaintiff and in no wise thereunto authorized by the defendant, unlawfully, fraudulently, and by deception practiced upon the Mother Superior and other inmates of said convent, and without the knowledge or consent of said defendant, took the said children from said convent, and defendant says that whatever, if any, nursing, care, clothing and medicine, or either, that said plaintiff furnished said children from said time, have been furnished voluntarily and without the knowledge or consent of this defendant, and without any agreement or contract with him or on his part, actual or implied. Then he further alleges that he has been always ready, able and willing to furnish the necessaries of life for said children, and to furnish them proper nursing, care, clothing, medicine and instruction, and has never neglected in any way his said children.

To this answer plaintiff files a reply, and in that reply he first admits that on or about March 5, 1890, the defendant took his said children from the residence of the plaintiff, where they were being boarded and cared for by him as set forth in the petition, to the Ursuline Convent. And now comes the denial: "But plaintiff says that the defendant took said children to said convent without the acquiescence or consent of his wife, Claudia Q. Murphy." Plaintiff admits that said convent is a Catholic institution—and now comes the denial again: "Plaintiff says that he has no knowledge, and therefore denies, that said convent was a proper place for children of such tender years." Then, in reference to the allegation made in the answer as to the taking of these children from the convent, after that, he says: "That afterwards, to wit, on or about April 2, 1890, the wife of the defendant, said Claudia Q. Murphy, upon going to said convent to visit said children, found them very much depressed in spirits, sick and discontented, and said Claudia Q. Murphy, fearing for their health and believing that if they were kept away from the home such as she and her parents could furnish, the said children were likely to fade away and die, she did, of her own free will and accord, take said children from said convent, and took them back to

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the residence of plaintiff, where, at the request of said Claudia Q. Murphy and under the express and implied promises of the defendant, this plaintiff did board, nurse, clothe and otherwise care for said children as set forth in the petition.

"And plaintiff further says that it is not true, and he therefore denies, that he ever acted in conjunction with said Claudia Q. Murphy in removing said children from said convent, or had anything to do whatever with said removal; but, on the contrary, the plaintiff had no knowledge of their being taken away until they were brought to his home by said Claudia Q. Murphy."

And further, by way of denial, he says that he denies that said children were unlawfully, fraudulently or by deception of any kind taken from said convent. "He further denies that the nursing, care, clothing and other necessities furnished by plaintiff to said children were furnished without the knowledge or consent of defendant and without any agreement or contract with him actual or implied; but, on the contrary, this plaintiff says that the defendant had full knowledge of said children being taken by said wife from the convent to the home of this plaintiff, and that they were being nursed, clothed and cared for as stated in the petition. And plaintiff says that the defendant frequently visited said children at his said home, making no objection whatever to their maintenance there, and otherwise ratified the action of his said wife in leaving the said children in the custody of the plaintiff. By reason whereof this plaintiff says that the defendant impliedly promised and agreed with plaintiff to pay him a reasonable and proper compensation for the said care and necessities furnished to the said children, and is estopped from asserting that he did not so promise and bind himself therefor."

"Further answering, this plaintiff says that it is not true, and he denies that the defendant has been ready and willing (although amply able) to furnish the necessities of life for the said children, or furnish them with proper nursing, clothing, care, medicines and instruction; but, upon the contrary, defendant has failed, neglected and refused to supply said children with any necessities of life, or otherwise care for them. And plaintiff says that the defendant ever since the separation from his said wife has neglected in every way to fulfill his duty as a father towards his said children."

Now the allegations made in the petition and denied by the answer are in issue. The affirmative allegations made in the answer, charging anything upon the plaintiff, and that are denied in the reply, are in issue. The denials in the reply of course make the issues to that extent so far as there are affirmative allegations in the reply; that is, making any charges or claims as against the defendant; there is no necessity for any further pleadings in reference to those, but those you will take as being denied.

And, gentlemen, this case is now to be submitted to you to determine the issues so made in these pleadings filed by the parties, upon the evidence which has been produced before you, and which the court has admitted as evidence in the case, and under the rules of law which I will give you to govern you in your investigations.

There are certain instruments in writing which have been introduced in evidence, and it is my province and duty to give you a construction of these written instruments. Under and by the articles of agreement between Mr. and Mrs. Murphy, dated December 31, 1889,

both the father and mother agreed thereafter to live separate and apart, but both the father and the mother reserved to themselves and to each of them, all their rights and privileges as parents except and subject to the following qualifications: First—That the said children were to have their home for the then present with the plaintiff in this case and his wife. Second—The children were never to be permitted to live with or have their home with a step-parent. That is, either with the future wife of the father or the future husband of the wife, if either should ever thereafter again marry. Third—The mother agreed not to remove the children from the care of Mr. and Mrs. Quigley without the consent of the father.

Under this agreement, gentlemen, the father, so far as the children in this case were concerned, had the right to remove the children from the care of the plaintiff and his wife at any time thereafter, when he chose to do so, without the consent of the mother, or of the plaintiff or his wife. As to the duties of the father after having removed them, I will instruct you further on.

The other written paper in evidence is the agreement signed by the plaintiff—Quigley—dated January 6, 1890. This agreement was signed only by Mr. Quigley, but, if delivered to the defendant, the children having thereafter been left by the defendant at the home of the plaintiff, so long as he permitted them to remain without objection, he is liable for the payment of the sum named therein per month for the board and care of said children, and for no greater sum. This agreement does not, however, include the cost of any clothing that might be provided for the children, or that was provided, if any was so provided, if you shall so find, during that time; and if you should find from the evidence that the plaintiff did furnish any clothing for them during that time—that is between the time when the children were taken by him and the time when they were taken away from him and taken to the convent by the defendant—but if said clothing was furnished at the request of defendant, or was necessary for said children and was not furnished by defendant; was reasonable, fit and suitable for such children, for the children of other parents in like situation in life and of like financial ability, then the defendant would be liable for the reasonable and fair value of the same.

The burden of proof, gentlemen, is upon the plaintiff to show what, if any, such clothing was provided by him, while the children were with the plaintiff up to the time they were taken from the plaintiff, and what was the fair cash value of the same at the time so provided.

The first matter for your consideration and investigation will be the extent of the defendant's liability, by reason of the board and care and clothing furnished, if any was furnished, during this time—and I am referring now in all that I say to the time between the period when the children were left with Mr. Quigley and the time when they were taken away to the convent. And to this value, when you so find it, interest may be added, at six per cent., from said time to the first day of this term of court, which is September 14, 1896.

And I further say to you as a matter of law, that unless you find that the plaintiff refused, on the request of the defendant, or in some way interfered with the taking of the children from the plaintiff by the defendant by reason of a notice—either verbal or written—whichever you shall find—if you find either—served by the defendant, Murphy, upon the plaintiff, Quigley, or claimed to have been so served, that so long as he allowed or permitted the children thereafter to remain with the plaintiff, his liability, whatever it was before the giving of the notice, would con-

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tinue. If the plaintiff refused to deliver the children to him at that time, that is, upon his demand, or interfered with his taking of them away, then the time when he so refused or so interposed to prevent their being taken from him by the father would terminate the liability of the defendant to him.

Now, gentlemen, you are to determine, under these rules, what amount the plaintiff is entitled to recover against the defendant by reason of the transactions prior to the taking of the children from Quigley by Murphy. And in any event, whatever you shall find that amount to be, the plaintiff will, in any event, in this case be entitled to a verdict at your hands.

Having disposed of this branch of the case, you will then proceed to consider the questions necessary to be determined as to whether or not the defendant is liable to the plaintiff for board, clothing, care or medicines furnished for these children from the time when the children were taken from the convent by the mother and returned to the plaintiff.

No claim can be allowed of the plaintiff while the children were in the convent, but from the time that they were returned up to the time that the mother afterwards took them from Mr. Quigley—which I think is said to have been May 1, 1894—the question as to the liability of the defendant for what transpired during this time, and the right of the plaintiff to recover for the board, care, clothing and maintenance of these children, is for you to determine, as I say, under certain rules of law and upon the evidence. And, considering these questions—the question of this liability—during that time, you will be required to observe certain rules of law, which I will now give you.

And, first: It is the duty of a father to provide reasonably for the support and maintenance of his minor children, if he be of ability to do so. He is under obligation to do so, both by natural law and the statutes of the state of Ohio. It is provided, by sec. 3110, Rev. Stat., that the husband must support himself, his wife and his minor children out of his property or by his labor; if he is unable to do so, the wife must assist him in so far as she is able. By the terms of this statute the husband is made primarily liable for the support of his minor children, and is bound to do so, out of his property or by his labor, if he is able to do so.

There is a further provision by the statutes of Ohio, known as sec. 3113, Rev. Stat.: "A husband and wife cannot by any contract with each other alter their legal relations, except that they may agree to an immediate separation, and may make provision for the support of either of them and their children during the separation."

Again, the father, being able, is bound by law to support his infant children and to furnish necessary clothing and care, yet the circumstances of the children, the necessity and the proper amount and kind of care, clothing and support to be furnished children, are, under ordinary circumstances, by law left to the sole discretion of the father, subject, however, to the rule that such discretion must not be abused to the injury of the children. If, however, the father, being able, neglects or refuses to provide for his children so as to render it necessary that some other person should so provide or care for them, then the law implies a promise or obligation on the part of the father to pay for the proper amount and kind of care, clothing and support of such minor children.

If you find from the evidence in this case that the children of defendant were placed by him in a convent in this city for education, care and support and that said convent was a proper and suitable place for said

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children to be and remain in, and that said children were taken from said convent by their mother, against the wish of the defendant; and find further that the plaintiff thereafter furnished board and clothing and care for said children, which wish was known to the plaintiff, and that during the time the plaintiff furnished such board, care and clothing, the defendant had made suitable and proper provision for their care, support and maintenance, and so notified the plaintiff, and requested the plaintiff to deliver them to him in order that he might so provide for them, and if the plaintiff refused to deliver the children to him, then from such time as he so refused upon such demand, he would have no claim against the defendant for any support, care or maintenance of the children; unless you also find that there was either an expressed contract between the plaintiff and defendant, whereby the defendant promised to pay for such board, care and clothing, or that under the rules which I will give you hereafter, a contract to make such payment may be implied.

Now, in making an application of these rules to the evidence in this case, I will say further to you as a rule of law to govern you:

1. The duty of the defendant here as the father of these children still rests upon him, and has rested upon him in full and binding force, notwithstanding under the articles of agreement between him and his wife they, during the time that these children were with the plaintiff, were living separate and apart from each other. These children were not and could not be parties to that agreement. It is no matter for inquiry on your part now in this case as to what were the causes of that separation, or by whose fault it was produced, and while the children must of necessity to some extent be affected by the breaking up of the family home, yet it is not the policy of the law to deprive them of their rights to support and maintenance and culture on account of any difficulty or dissension between their parents.

2. In determining whether there has been a proper performance by the father of his obligation in this case to support, maintain and care for these children, the question as to what was or is for the best interest of the children must be considered by you. The fundamental principle relative to such matters is to regard the benefit of the infant; to make the welfare of the children paramount to the claims of either parent. And while the discretion is with the father primarily to select the method and the way in which he shall provide for such support and care and maintenance of his children, yet he cannot be permitted in the exercise of such discretion unnecessarily or without reasonable cause so to act as to injure his children in their health, comfort or enjoyment, or future prospect in life.

3. It was the duty of the defendant in this case when these children were removed from the home of the plaintiff and placed in the convent, to provide for their maintenance, support and care under and in accordance with these rules, and it is for you, gentlemen of the jury, to determine from the evidence before you, considered under these rules, whether in placing them in the convent he did so provide. In determining this question you must consider all the conditions and circumstances under which these children were placed there in so far as they are disclosed in the evidence before you; their ages at the time the defendant placed them in the convent; their health and physical condition and the manner in which they had been accustomed to live; the care which they had before received; the character of the convent so far as the care of such children of similar ages is concerned, its method of treatment of

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such children—in short, gentlemen, everything disclosed to you in the evidence that would affect the comfort, health and physical well being of the children in the present, and their prospects for happy and useful lives in the future.

The discretion being in the father to select the place where and the proper person who should so provide for his children, the presumption is that the convent was such a place, and the burden is upon the plaintiff to show by a preponderance of the evidence that the provision so made was not under these general rules and under the evidence in this case a proper provision. If you find under these rules that such provision was not such a proper provision, then these children, being infants of such tender age as not to have the ability or judgment to act for themselves, their mother would have the right to remove them to some proper place and provide for their support and maintenance until the father should thereafter provide proper and suitable maintenance and support for the children; and for the reasonable expense of so doing the father would be liable to the person who furnished the same at the request of the mother, and such person would not be a volunteer, although bearing no relation whatever to the children.

Now, as you so find under these rules and upon all the evidence before you, will depend the right of the plaintiff to recover for the support and maintenance of the children by reason of their having been placed in his hands by the mother after she took them from the convent.

If, however, you shall fail to find that the mother was justified in taking the children from the convent and placing them in the hands of the plaintiff, there is second and still a further inquiry which you would be required to make: It is conceded in the evidence in this case that very soon after the children had been so taken from the convent and placed in the home of the plaintiff, the defendant was notified that she had done so; that within a short time thereafter he visited and saw the children at the home of the plaintiff, and that he saw them thereafter from time to time while they so remained in the home of the plaintiff. Now, gentlemen, if you find from the evidence before you, that he, the defendant Murphy, in this case, knew, or had full means of knowing, of the character of the support and maintenance—of the board and clothing and care—which plaintiff was during this time furnishing to these children, and permitted them, without objection thereafter made or during that time made, to remain in the house of the plaintiff, receiving this care, maintenance and support from the plaintiff without himself providing other proper and suitable maintenance and support for the children, you will be justified in finding an implied promise on his part to pay the fair and reasonable value of the board, clothing and care so furnished by the plaintiff.

In answer to this implied promise, evidence has been given on behalf of the defendant that the mother has told him, in effect, that she was providing for the support of the children, and that he would not be called upon to make any payment for the same; and evidence has been offered tending to the contrary, but I say to you in reference to this that while you must consider all this evidence, that unless the facts in reference to any such representation made by the mother were brought to the notice of the plaintiff, or he was otherwise so notified, they would not as against him affect any such implied promise, if any such promise you should find, as being otherwise implied under the rules which I give you.

Now, gentlemen, if you fail, upon all the evidence produced before you, all considered, and upon a preponderance of the same—not beyond a reasonable doubt, as in a criminal case, but only by the preponderance of the evidence—fail to find that the defendant is liable, upon either of these grounds that I have stated, to the plaintiff for any board, clothing or care furnished by the plaintiff after the children were returned to him from the convent, then you will be relieved from further consideration of this branch of the case, and you will not find any amount for the support of the children after they were so returned to him from the convent.

If, however, you do find from the evidence before you and under the rules given you that the plaintiff is entitled to recover for the maintenance, care, board or clothing furnished by plaintiff to these children, after they were returned to him from the convent, then you will proceed to determine the amount that the plaintiff is so entitled to recover. Such amount will not be governed by the agreement of February 6, 1890, but will be the fair and reasonable value of the board, care and clothing so furnished by the plaintiff to these children, providing that such board, care and clothing was such as was reasonably suitable and proper for children of their age, considering the situation of life and financial ability of the father. The amount must not exceed such sum as you will find will reasonably and fairly compensate the plaintiff for the maintenance of the children in such situation of life as the children of the defendant should fairly occupy, and it must further not exceed the amount claimed by the plaintiff in his petition; but if you do find any sum so due, you may add interest upon that from the first day of May, 1894, to the fourteenth day of September, 1896, the first day of this term of court.

And now, gentlemen, I only need to remind you, what you all know and have been repeatedly told, as you are all regular jurors, that upon you rests the responsibility of determining the facts in this case upon the evidence before you, paying careful attention to the rules of law which the court gives you. As to the facts, the court expresses no opinion one way or the other.

Most of the witnesses have been upon the witness stand; you have seen them and been able to judge of their manner. You are to take into consideration their appearance upon the witness stand, as well as any interest or feeling they may have in the case. In short, considering all these witnesses, judge for yourself as to the credit to be given to their testimony; and where there may be any difference between them, you will determine calmly and dispassionately, and not allow any feeling to influence you; but calmly and dispassionately determine what are the facts and what is just and right, remembering the verdict that you render is upon your oath and conscience.

The jury brought in a verdict in the case for the plaintiff in the sum of \$1,135.74.

Hurd, Brumback & Thatcher, for plaintiff.

Parks & Van Campen, for defendant.

PRIZE FIGHTS.

[Clark Common Pleas.]

STATE OF OHIO V. EARL MOORE.

1. When two persons by previous agreement enter into a contest for supremacy by the administration of blows with the fist upon the bodies of each other, which contest, by the agreement, shall continue until one of them becomes a victor over the other, and when, by such agreement, there is to be given to the victor in such contest money or other thing of value, whether such money or other thing is the result of a wager between the parties, or a reward contributed by others, or the proceeds of door or gate receipts, this constitutes a prize fight.
2. It is not essential, in order to constitute a prize fight, that the contest should be with the naked hand or fist. But the fact that the contest was had with gloved hands, as also the kind, size, weight and other characteristics of the gloves so used, may be looked to in connection with the other evidence bearing upon the question whether such contest was a prize fight, or merely a sparring or boxing exhibition.
3. It is not necessary, to constitute a prize fight, that the agreement to enter into the contest should have been made for any particular length of time previous to the actual contest, but only that it should have been made and understood between the parties at some time, at least, however brief, before such contest began.
4. And while such agreement to contest for a prize or wager must be an agreement to contest until one of the parties obtains a victory over the other, it is not necessary that such contest should be maintained until such victory is actually obtained or that it should be "fought to a finish." Nor is it necessary that the prize, wager or reward aforesaid should actually be paid to either of the contestants, for if the prize fight is actually begun the offense is complete, although its final consummation may have been prevented from any cause.
5. It is not necessary that the agreement to contest should be made in any form of words or in writing. It is sufficient if the parties consent to the contract, either by words or gestures, and an agreement may be inferred from the conduct of the parties.
6. The agreement of aiders and abettors of a prize fight will bind the principals only when such agreement is made known to the principals before the contest.

CHARGE TO THE JURY.**MILLER, J.**

The term "prize-fight" has been defined to be a pugilistic encounter or boxing match for prize or wager, but as the statutes of Ohio have prohibited this and other offenses of a somewhat like character in the same chapter of said statutes, it is proper, in order to mark the distinction between this and said other offenses, to give you a more specific definition: and therefore, I charge you that when by previous agreement between persons, they enter into a contest for supremacy by the administration of blows with the fist upon the bodies of each other, which contest by the agreement shall continue until one of them becomes a victor over the other, and when by such agreement there is to be given to the victor in such contest money or other thing of value, whether such money or other thing is the result of a wager between themselves or a reward contributed by others or the proceeds of door or gate receipts, we have all the elements of a prize-fight. It will be observed by this definition that no account is made of the question as to whether such contest is had with naked or gloved hand or fist; neither in order to constitute it a prize-fight is it essential that it should be with the naked hand or fist;

but the fact, if it should so appear from the evidence in this case, that such contest was had with gloved hands, as also the kind, size, weight and other characteristics of the gloves so used, may be looked to in connection with the other evidence in the case bearing upon such question, in determining whether such contest was a prize-fight, or merely a sparring or boxing exhibition without prize or reward to the victor, in which latter case, if you so find, the defendant should be acquitted; but I charge you further in this connection, that if taking such evidence as to said contest having been had with gloved hands, and the kind, size, weight and other characteristics of said gloves so used, in connection with the other evidence in the case, you are satisfied beyond a reasonable doubt under the specific definition I have given you as to the meaning of the phrase prize-fight, that said contest was a prize-fight, you must so find notwithstanding it may have been with gloved hands. I charge you further as to the previous agreement spoken of in said specific definition of the term or phrase prize-fight, that it is not necessary that said agreement to enter into said contest should have been made at any particular length of time previous to the actual contest, only that it should have been made and understood between the parties at some time at least, however brief, before such contest began.

I charge you further that although such agreement to contest for a prize or wager, as I have before defined to you, must have been an agreement to contest until one of the contestants obtained a victory over the other, it is not necessary that such contest should have been maintained until such victory was actually obtained, or to use an ordinary phrase, that it should have been "fought to a finish," nor that the prize, wager or reward aforesaid should have been actually paid to either of the contestants, for if the prize-fight, if you so find under the evidence and my instructions, was once actually begun, that offense was complete, although its final consummation may have been prevented from any cause.

I charge you further in reference to the agreement of which I have spoken in the definition aforesaid, that it is not necessary that such agreement should appear to have been made in any form of words, or in writing. Consent is agreement, and it is sufficient if the defendant was consenting to the combat, either in words or by gestures. An agreement may be inferred from the conduct of the parties and other circumstances; so you may look as well to the conduct of the parties, not only before but during the continuance of the contest, and to all the other facts and circumstances proven upon the trial to determine what agreement, if any, existed between the defendant and his co-defendant with reference to such contest previous to the beginning thereof.

I am asked to charge you that if an agreement to enter upon said contest had been made by their seconds or other parties on their behalf said defendants would have been bound by it, and I so charge you with this essential condition, that if so made, such agreement and its terms should have been known by said defendants before said contest began, for it is not to be presumed that the agreement of aiders and abettors of a prize-fight will bind the principals without their knowledge of the terms of such agreement.

SPECIAL GRAND JURY—WITNESSES—PERJURY.

[Franklin Common Pleas.]

IN RE COMMISSIONERS OF FRANKLIN COUNTY.

1. A grand jury cannot find an indictment unless the evidence before them, unexplained and uncontradicted, would authorize a conviction by a petit jury.
2. But in determining that question grand jurors have no right to assume that there will be evidence on the trial to either explain away or contradict the inculcating evidence before them.
3. The rule in criminal cases applicable to trials in courts, requiring the evidence to be strong enough to establish guilt beyond a reasonable doubt, has no application to the conclusions of grand jurors.
4. Where a person who has committed a crime is a witness before a court and jury, or either of them, the fact that his crime involved in any sense moral turpitude is a fact which should be taken into consideration as affecting the weight and value of his testimony.
5. To make the testimony of a witness the absolute ideal truth, upon which practical action can, with perfect safety, be taken, he should be a person of fair character, of good habits and of reasonable integrity and fidelity in the discharge of his duties.
6. False testimony under an oath administered to a witness by a deputy clerk in the common pleas court room to testify to such matters and things as may lawfully be inquired of before the grand jury, is within the terms of the statute defining perjury.
7. The lawful form of oath is that the evidence the witness shall give will be the truth, the whole truth and nothing but the truth.
8. Having so sworn, the person testifying must wilfully, corruptly and contrary to his oath state a falsehood as to some material matter which he does not believe to be true.
9. By the language "material matter" is meant the main fact which was the subject of inquiry, or any circumstance which tends to prove that fact, or any fact or circumstance which tends to corroborate or strengthen the testimony relative to the subject of the inquiry or which legitimately affects the credit of any witness who testifies.
10. If a witness makes contradictory statements under oath, before different grand juries, in regard to the same matter, if the two statements are opposite and irreconcilable, one true and the other false, and knowingly made, such witness commits perjury by the false statement.
11. If a witness swears to a thing of which he consciously knows nothing, the thing being false, it is wilful and corrupt and perjury.
12. The rule now is that the evidence showing the witness' testimony to have been false must be something more than sufficient to counterbalance the oath of the witness who is accused of perjury, and the legal presumption of innocence. The oath of one witness and corroborating circumstances are enough to do that; and the corroborating circumstances do not have to be so strong as to equal the positive testimony of another witness, nor so strong that, standing alone, they would justify a conviction.
13. A special grand jury assembled to consider one case is not thereby prevented from investigating any matter which involves a violation of the criminal law of the state.

PUGH, J.

Gentlemen:—You have been convened as a special grand jury to consider one matter. At the beginning of this term the regular grand jury preferred an indictment against the county commissioners for an alleged acceptance of a bribe of \$1,200. The indictment, not having described the person or persons by whom, it was claimed, the money was paid to the commissioners, it was held by the court to be insufficient in

law to put the commissioners upon trial before a petit jury, and, for that reason, it was quashed.

Conceiving that the public welfare and public justice demanded that this charge should be speedily investigated and tried, and that the commissioners, if innocent, should be vindicated without delay, you were summoned here, as a special grand jury, to consider the case.

The statute of the state declares that an officer who accepts any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment, in any matter pending or that might legally come before him, shall, upon his conviction, be imprisoned in the penitentiary, or be fined, or be punished in both ways.

The charge in the case is that the commissioners accepted the \$1,200 to influence their action and vote in awarding a contract for the construction of a county bridge; that is, that they received and accepted the \$1,200 as a consideration for awarding the contract to build the bridge to the person or persons by whom the money was paid. I need not dwell upon the enormity of the crime of public officers receiving bribes for their official action. The vocabulary of righteous censure might be exhausted, and still there would be more that ought to be said.

Public officers who sell their official votes like merchandise in the market, commit a crime which is a danger and injury, not to one or several individuals, but to the whole community at large. It tends to the perversion of justice in the department of the government to which such officers belong. It is corruption of the most flagrant character.

Among ancient peoples rewards and emoluments paid to public officers for the performance of their official duties were not only tolerated, but encouraged. But as nations advance the number of crimes increase, while their punishment becomes milder. A criminal law is an expression of the perception or feeling of the people. Modern legislators perceived the heinousness of bribe-taking by public officers. That has become more obvious as the power of wealth increased. This kind of corruption, threatening the purity of governmental administration, is utterly odious to the spirit of democratic government. It is one of the domineering and paramount evils wherever it exists. "And as wealth and power may become powerful forces in this dangerous direction, the protection of equal rights among the people demands that a severe penalty be visited" upon any officer, whether executive, legislative or judicial, who receives, or offers to receive, any valuable or beneficial thing as a reward for, or as an inducement to official action.

To allow an officer who is guilty of such an offense to escape, would be to legalize and make corruption respectable; and if the time ever comes when courts and juries shall wink at such shameless disobedience of law, the government they represent will become "totally perverted from its purposes; neither God nor man will long endure it; nor will it long endure itself."

The prosecuting attorney and his assistant will present this charge to you and examine the witnesses, if they deem it necessary.

You cannot find an indictment against the commissioners unless the evidence before you, unexplained and uncontradicted, would authorize a petit jury to convict them of the crime charged. If the evidence establishes only a probability of guilt, I advise you not to return a bill. But in determining this question, whether there is evidence sufficient to warrant a petit jury in convicting, you will have no right to assume that

there will be evidence on the trial, before the petit jury, to either explain away or contradict the inculcating evidence before you; you must decide it upon the evidence given before you; and, I repeat, if you are satisfied that that evidence, unexplained and uncontradicted, would justify a petit jury in finding them guilty, it is your obligation to return an indictment against them.

The rule in criminal cases applicable to trials in courts, requiring the evidence to be strong enough to establish their guilt beyond a reasonable doubt, has no application to your conclusion as grand jurors.

You will probably not be in session very long, still the duties enjoined upon you by the oath which you just took must be as scrupulously observed as if you were to sit here for a month. I will emphasize a couple of its passages.

That oath makes it your duty to keep rigidly in confidence the counsel of the prosecuting attorney, his assistant, your fellow jurors and yourselves, until compelled in a court of justice to reveal it. There is no obscurity or ambiguity in that language. It means that you are not at liberty to communicate to any one what has been, or will be, done in the grand jury room. It means that it is unlawful for any of you to tell any one what was said in the grand jury room by any one, on any subject or question which was considered there, or how any of your fellow jurors or yourselves voted on any question.

This is not an idle obligation; it is not a meaningless obligation; it is just as obligatory upon each of you as is the oath of a witness to tell the truth, the whole truth and nothing but the truth.

I do not intend to be offensive, but I advise you, as all grand jurors have been advised in the past, that, if any member of this jury should disregard this part of his oath, and it should be so shown here in court, he will be visited with the severest penalty of the law.

Another most significant portion of your obligation is, that you must not indict any person through malice, hatred and ill-will, but, at the same time, must not leave any one unindicted from fear, favor, affection or reward, or hope thereof, and also in all presentments you must present the truth, the whole truth and nothing but the truth, to the best of your skill and understanding. You must not permit your judgment to be influenced or controlled by any religious or political bias, or personal feeling. When you start upon the investigation of this case you must divorce yourselves from all such feelings and prejudices. It is not a political question you are about to consider. Whether any political party will be aided or embarrassed by the result of your investigation is a consideration which must be peremptorily excluded when you make up your judgment.

I shall italicize another point. This court is not ordering you to indict the commissioners; you are being ordered to investigate the case. One grand jury having found a bill, the court would be derelict in his duty if he failed to give this in charge to another grand jury. But you must not return a bill against them simply because one grand jury preferred an indictment against them. It is your duty to decide the question, whether they shall again be indicted, by the evidence which you will hear, without regard to the finding of the other grand jury.

You must not infer that I have intended to express any opinion about the guilt or innocence of the commissioners. I have no opinion, and, if I had, it would be highly improper to give expression to it.

One observation and instruction about the witnesses, or some of them, is relevant.

Where a person who has committed a crime is a witness before a court and jury, or either of them, the fact that his crime involved in any sense moral turpitude is a fact which should be taken into consideration as affecting the weight and value of his testimony. To make the testimony of a witness the absolute truth, ideal truth, upon which practical action can, with perfect safety, be taken, he should be a person of fair character, of good habits, and of reasonable integrity and fidelity in the discharge of his duties. Where he is not such a man, but has departed from a life of rectitude, and has committed a crime involving moral turpitude or moral delinquency, that circumstance is to be considered as tending to weaken the weight and strength of his testimony, which it would otherwise possess.

But it does not at all follow from this that, because he has committed such a crime, before his examination as a witness, that his testimony is to be discarded. That is not required of courts or juries by the law. If it did, it would not permit the testimony of such a witness to be given or taken. What the law does command courts and juries to do, is to take into consideration the appearance of each witness, his apparent intelligence, his apparent candor, the circumstances under which he gives his testimony, his previous delinquency, and upon this determine whether he has told the truth or not, whether his testimony is entitled to any weight or effect; and further, if its weight is diminished, the duty rests upon them to look into the case and ascertain whether there are facts and circumstances that either corroborate or contradict the witness, which either bolster up his position and tend to prove, notwithstanding his previous misconduct, that he is speaking the truth, or which impair and destroy his testimony.

That is the way you are to look at the testimony of such a witness.

I have said you were assembled as a jury to consider one case. That is all the court has to give you in charge. But this does not prevent the prosecuting attorney from calling to your attention any matter which the proper administration of the law may, in his judgment, demand. Nor does it prevent you from investigating any matter which involves a violation of the criminal laws of the state, and of which you may have reliable knowledge.

SECOND CHARGE.

Gentlemen: Guided by official information which I have received, I am convinced that it is my duty to give you another matter in charge. It could not be done till the report on the case given you in charge last Tuesday, which has just been received from you, was made. You are now, therefore, ordered to investigate and determine whether one of the witnesses who testified before you did or did not commit perjury, either in giving his testimony before the regular grand jury at the beginning of this term, or in giving his testimony before you, or on both occasions. The statute of Ohio defines perjury in this language: "Whoever either verbally or in writing on oath lawfully administered, willfully and corruptly states a falsehood as to any material matter in a proceeding before any court, tribunal or officer, created by law, or in any matter in relation to which an oath is authorized by law, is guilty of perjury."

The crime of perjury is a crime against public justice. In all judicial trials it is a fundamental principle that in the ascertainment of the truth

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in controversy, implicit reliance must be placed upon the obligation of witnesses to tell the truth, which is impressed upon them by the solemn oath administered in accordance with law, and upon the respect and reverence which such witnesses have, in their minds and consciences, for that obligation. Originally perjury was not punishable in the courts. It was regarded as a moral sin for which the perjurer was answerable to an offended Deity, and its punishment was left to be administered by the conscience and by that Deity's laws. But for several hundred years it has been made a crime in civilized countries and triable and punishable in the courts.

"Truth is the very bond of society." The orator Lycurgus truthfully admonished the Athenians that no nation could live a year in which the obligation of an oath was not binding. Anarchy and chaos would soon be inaugurated where it ceases to be respected. A family cannot be governed by lying, and the same may be predicted of society. No considerations can sanctify the sacrifice of truth, especially in judicial trials.

I mention the gravity of the offense of perjury, not to excite an undue anxiety or prejudice in your minds, but to help you to accurately estimate its magnitude and its perilous consequences to society. At the same time you must not confuse its magnitude and its important and disastrous consequences to society with the guilt or innocence of the one investigated for perjury.

The several elements of the crime of perjury will now be explained. The oath must have been taken, and the falsehood must have been stated in some matter in relation to which an oath is authorized by law. If the oath was administered to a witness by a deputy clerk in this court room to testify to such matters and things as may lawfully be inquired of before the grand jury, and if the false testimony was given before a grand jury, that was within the terms of the statute defining perjury.

The oath must have been that the witness would testify truthfully. If he swore that the evidence he would give would be the truth, the whole truth and nothing but the truth, that was the lawful form of the oath.

Having been so sworn, the person testifying must willfully, corruptly, and contrary to his oath, have stated a falsehood, as to some material matter which he does not believe to be true. By the language "material matter" is meant the main fact which was the subject of inquiry by either grand jury, or any circumstance that tended to prove that fact, or any fact or circumstance which tended to corroborate or strengthen the testimony relative to the subject of the inquiry, or which legitimately affected the credit of any witness who testified. Another way of defining the words "material matter" is, that any evidence given by the witness which tended to influence the result of the inquiry by either grand jury on the direct or collateral question, was material in the sense of the law.

The testimony which is assigned as perjury must have been false. If a witness made contradictory statements under oath, before different grand juries, in regard to the same matter—if the two statements are opposite and irreconcilable; if one is true and the other is false—and if they were knowingly made—he committed perjury by the false statement. If both statements are false, perjury may be assigned of both, although such a case is hardly probable.

The false statement must have been wilfully and corruptly given by the witness. If a witness swears to a thing of which he consciously knows nothing, the thing being false, it was wilful and corrupt, and perjury. If he does not believe it is true, it is wilful and corrupt. Corrupt means de-

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proved, debased in character. Wilful means without reason, intentional, deliberate.

The evidence showing that the witness' testimony is false must be more than the testimony of one witness. It was formerly the law that two witnesses were necessary to prove the crime of perjury, but this rule has long since been modified and this is true in Ohio. The rule now is that the evidence must be something more than sufficient to counterbalance the oath of the witness who is accused of the perjury, and the legal presumption of innocence. The oath of one witness and corroborating circumstances are enough to do that. The corroborating circumstances do not have to be so strong as to equal the positive testimony of another witness; nor do they have to be so strong, that, standing alone, they would justify a conviction; it is only necessary that they should be strongly corroborated or strong enough to cause the scale to preponderate in favor of the witness whose testimony tends to prove the perjury.

The witness to whom I refer and whose case you are ordered to investigate is Joseph M. Briggs.

It is competent for you to summon before you to testify on this investigation members of the regular grand jury, the county commissioners and any other persons who may know anything about it.

PRIZE FIGHTS.

[Summit Common Pleas.]

IN RE ATHLETIC CLUBS.

1. Men who fight on wager or for a prize or a reward, such as the gate money, or with the accompaniments of backers, referees and umpires, do not, in any fair sense, come within the permissive provisions of sec. 6890, Rev. Stat., providing that secs. 6888 and 6889, relating to prize fights, shall not apply to public gymnasias or athletic clubs. It is only the legitimate exercises of such institutions that are excepted by the provisions of sec. 6890, Rev. Stat.
2. An athletic club or gymnasium which aids or abets a prize fight is liable to indictment, notwithstanding the permission of the sheriff or mayor, given under sec. 6890, Rev. Stat.
3. Any combat which is essentially a prize fight, no matter by what name called nor under what rules or gymnasium or club conducted, nor by whatsoever permission had for its exhibition, is a violation of the statute.

INSTRUCTIONS TO GRAND JURY.

VORIS, J.

The court wishes especially to call your attention to the provisions of the statute relating to prize fighting:

"Whoever engages as principal, in any prize fight, shall be imprisoned in the penitentiary not more than ten nor less than one year." Sec. 6888, Rev. Stat. "And whoever aids, assists or attends any prize fight as backer, trainer, second, umpire, assistant or reporter, shall be fined not more than \$500 nor less than \$50, and imprisoned not more than three months nor less than ten days." Sec. 6889, Rev. Stat.

An erroneous impression seems to have grown up among many of our people that the provision of sec. 6890, Rev. Stat., which reads as follows: "Provided, that nothing in the foregoing shall apply to any gymnasium or athletic club, or any of the exercises therein, if written permissions denounced by the statute. Public gymnasias or athletic clubs, such as

In re Athletic Clubs.

of the county, or, if the exercises or exhibition are had within the limits of a municipal corporation, of the mayor of such corporation," makes the provisions of secs. 6888 and 6889, Rev. Stat., inoperative, if the sheriff or mayor, as the case may be, gives the foregoing permission. The Supreme Court, in a recent case, *Seville v. State*, 49 O. S., 117, held that this permission had no relation to sec. 6889, Rev. Stat. We also say to you that no exhibition, which in its essential qualities is a prize fight, comes within the permissive provisions of the statute. Men who fight on wagers or for a prize or a reward, such as the gate money, or with the accompaniments of backers, referees and umpires, do not come, in any fair sense, within the permission of the statute; but, on the contrary, are the very acts and persons denounced by the statute. Public gymnasia or athletic clubs, such as come within the contemplation of the statute, are not conducted nor legally recognized for any such purpose. It is only the legitimate exercises of such institutions that are excepted by the provisions of sec. 6890, Rev. Stat. An athletic club or gymnasium which aids or abets a prize fight, though under the sanction of the sheriff's or mayor's written permission, would be liable to indictment, notwithstanding said permission. Any combat which is essentially a prize fight, no matter by what name called, nor under what rules or gymnasium or club conducted, nor by whatsoever permission had for its exhibition, is a violation of the statute. If, in the plain, common sense English of the term "prize fight," you can say that a prize fight has been had in Summit county, it is your duty to indict, under secs. 6888, 6889 or 6890, Rev. Stat., as the case may be, whoever participates therein, either as principal, or aiders and abettors of such fight.

I need not but remind you of the brutalizing tendency of the prize ring, and the demoralizing effect it has upon our boys. The halo that crowns the victor of the ring soon goes out, along with a dissipated life, the hero prematurely ending his career, usually in a disreputable occupation, and a worse than useless existence.

The court indulges the hope that no act or omission of yours shall give any countenance to any violation of the provisions of the statute, in this respect, in Summit county, and that your official action will indicate to all brutally-minded men that the administration of public justice is actively set against them in this county, and that this is no community for them to come to for exhibitions denounced by our statute.

STREET IMPROVEMENTS.

[Summit Common Pleas.]

IN RE AKRON STREET IMPROVEMENT.

1. Where a city for thirty years has adopted and used a street without change of grade, and a property owner makes his improvements, and uses reasonable care, discretion and judgment in making them, with a view to a future proper and reasonable change of such grade, and the city causes a change of grade of such street to be made subsequently which obviously results in damage to said improvements, and such change of grade could not, by ordinary care, discretion and judgment have been anticipated, then the city is liable for such injuries. It should appear, however, that such long continued grade had been adopted by the city, either by ordinance or by such improvements and use of the street as to indicate fairly and fully that the grade was permanently fixed.

Summit Common Pleas.

2. In determining whether the grade has been permanently fixed the street must be considered in a much broader sense than its mere relation to the property owner's premises or the immediate vicinage. It must be taken with reference to the general uses and purposes to which the street is devoted by the city and the public; nor should this be limited to the mere purposes of travel thereon, but should be considered with reference to the system of drainage and sewerage, and every reasonable public necessity that might reasonably grow out of its use and purposes as one of the public streets of the city, so as to harmonize with the street system.
3. Misrepresentations of a city engineer as to the ordinance grade of a street, established by the city, or the depth of a cut, cannot serve as a foundation for an action against a city, if the improvement is actually made to the grade established.
4. Both the owner of abutting lands and the city must act reasonably in the matter of making improvements, both having reference to such future use as the wants of the public reasonably require.
5. The fact that a municipality reasonably delays making expensive improvements is not to be treated as a waiver of its right or intention to properly improve the street when it becomes, in its discretion, reasonably proper so to do and as the needs of the public require.
6. What is reasonable is wholly within the discretion of the municipal authorities, so long as such discretion is reasonably exercised under the circumstances of the given case.
7. It is the duty of a city having established or changed the grade of a street, to have such a plan and profile on file as will readily advise persons of ordinary intelligence of the extent the proposed improvement will affect property owners' premises.
8. If the plan and profile fail to give such information, or give it in such a way as requires one skilled in such work to understand, and the property owner is not so skilled, it is competent for him to go to the city engineer, and seek the necessary information and to rely upon the statements of such engineer.
9. And where a property owner, acting in good faith, relies on the statements of the city engineer, and because thereof accepts a certain sum in satisfaction of his damages when in fact the grade and improvement cut down in front of his premises, some two feet more than the city engineer represented, such property owner is not to be barred from maintaining an action to recover additional damages.

CHARGE TO JURY.

VORIS, J.

The real contention is practically narrowed down to—

1. Whether the plaintiff made any improvements or betterments on his lot on corner of Market and Balch streets, with reference to an established grade of Balch street, and if any were so made, what are they; and were such improvements and betterments rendered less valuable by reason

of the alleged change of grade and consequent street improvements made pursuant to said grade?

2. Whether the matters of alleged damages were settled and adjusted by the parties—and if so, is the plaintiff still entitled to have the settlement set aside, by reason of the matters set up in the petition, so as to correct the mistakes or errors of said settlement?

3. Whether the plaintiff is entitled to damages by reason of anything set up in the petition, and if so, how much?

Certain general principles, or rules of law, must be applied and guide you in determining this case. I need hardly say to you that you must be guided by the evidence and our instructions to you. I feel like emphasizing this, as you have viewed the premises, and might incline to follow your personal judgment from what you then saw. This would

In re Akron Street Improvement.

not be proper on your part. You viewed the premises the better to enable you to apply the evidence, but not to stand in the place of the evidence of witnesses.

As a general rule, a municipal corporation is not liable for damages to property abutting upon a street resulting from the improvement of such street, provided such improvement is made within the scope of the authority of the municipal corporation, and reasonably made; and we say to you that the alleged improvement of Balch street is within the scope of the municipal authority; nor is there any contention that it was not reasonably made. But this rule would not prevail if the plaintiff made substantial improvements on his lot, with a view to an established grade, and the city afterwards altered the grade and dug down the street so as to materially impair the value of such improvements, and the city would be liable to him for damages so caused if the evidence brings him within the provisions and limitations of our instructions to you.

Balch street having been one of the streets of the city for many years, and whether dedicated to the public or appropriated by the city, the abutting owners are presumed either to have waived or received full compensation for the lands embraced in the street, and for all damages that they would sustain by any reasonable grade and improvement the future needs of the public might reasonably require. So that up to the time the city established a grade that fairly indicated that it was a finality, the plaintiff, and his predecessors in title, should be treated as having made their improvements subject to the establishment of such reasonable grade and improvements as the city might reasonably thereafter make, and without remedy against the city, if such future improvements injured his premises. But if you should find from a preponderance of the evidence that the city for years, say thirty years, had adopted Balch street as a street of the city, and used the same as such, without change of grade, and the plaintiff made his said improvements, if any he made, and used reasonable care, discretion and judgment in making his said improvements, with a view to a future, proper and reasonable change of such grade, and the city caused a change of grade in such street to be made subsequently, which obviously resulted in damage to his said improvements, and the change of grade causing such injury could not, by ordinary care, discretion and judgment, have been anticipated, then the city would be liable for such injuries, if you find in other respects that the plaintiff is entitled to recover, under our instructions to you and guided by them.

It should, however, appear that such long continued grade had been adopted by the city, either by ordinance or by such improvements and used of the street as to indicate fairly and fully that the grade was permanently fixed, and that the wants of the public would not require a change therein. And in determining this matter you should consider Balch street in a much broader sense than the mere relation it sustains to the plaintiff's premises, or immediate vicinage. It must be taken with reference to the general uses and purposes to which the street is devoted by the city and the public; nor should this be limited to the mere purpose of travel thereon, but it should be considered with reference to the system of drainage and sewerage, and every reasonable public necessity that might reasonably grow out of its use and purpose as one of the public streets of the city, so as to harmonize with the street system.

A street grade may be established in two ways: First—By the formal passage of an ordinance, by the city council, for that purpose.

Second—By such improvements and appropriations of the streets to public use by the authorities, as to fairly indicate that the grade was permanently fixed, such as grading, curbing, guttering, paving, sewerages, laying of gas and water mains, and the like, and that no future change or other use would be likely to be required under the circumstances; the more permanent the character of such improvements and appropriations, the more obvious would be this presumption. An appropriation or dedication of a street implies that the street is to be perpetually used for all the purposes for which public streets are used, and for which but one compensation can be demanded for all damages which will result from the appropriation and reasonable improvement of the street.

Obvious reasons exist why the grade of streets should be fixed by ordinance. The ordinances of a city are a permanent and legally recognized repository of the determinations of the city for such matters—and so kept and preserved that all interested parties have a convenient place to go for information—and furnish unvarying information as to the relation the grade bears to the lots of the abutting owners, and thus serve as a safe guide by which they may improve their respective properties. Such ordinances also enable the city to preserve the harmony of its street system, which is essential to a proper system for surface and sewer drainage. No mere lapse of time or user or temporary improvements ought to be permitted to prevail against or stand for an ordinance establishing a street grade, except such use and improvement as indicate fairly and fully a fixed and permanent grade, and that the wants of the public would not require a change thereof.

It became and was the duty of the city, whenever in the exercise of its discretion it deemed it expedient, to establish the grade for Balch street, and to improve it, and until it did so, by some of the means so indicated in our instructions to you, you are not to presume an established grade for Balch street. Whatever improvements the growing wants of the public needed, as to Balch street, and the time and mode of making them, were and are wholly within the discretion of the city government, and nobody else, so long as it reasonably exercised that discretion; and for the case on trial, it is not contended that the city has unreasonably exercised its discretion, so you are to presume that it did so reasonably; and plaintiff should be deemed to have made his improvements with reference to this understanding.

After the city had by ordinance established its grade for Balch street, which is said without contradiction to have been on October 18, 1882, the plaintiff was bound to make his improvements with reference to such ordinance grade, and if he did not do so, any injury he might afterwards sustain thereto, by reason of the reasonable improvement of said street, pursuant to said grade, would be chargeable to his own folly, and for which he cannot recover. In that case, it matters not whether the city engineer misrepresented the depth of the cut, if the improvement was actually made to the established grade, for no misrepresentation of his could serve as foundation for an action against the city, when in fact none other existed.

Both the owner of the abutting lands and the city must act reasonably in the matter of making improvements—the owner on his property, and the city as to its grade and street improvements—both having refer-

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ence to such future use as the wants of the public would reasonably require.

Streets are essentially permanent physical conditions of city existence, and when appropriated to the public as part of the street system imply that as fast as the needs of the public require, they will be improved in a manner adequate to reasonably meet the public requirements; but it would be unwise and frequently very oppressive to make such improvements faster than the ability of the abutting owners would make practical, and this is especially true as the more expensive and permanent street improvements are paid for largely by local assessments. The fact that the municipality reasonably delays making expensive improvements is not to be treated as a waiver on its part of its right or intention to properly improve the street when it becomes, in its discretion, reasonably proper so to do, and as the needs of the public require; and what is reasonable is wholly within the discretion of the municipal authorities, so long as such discretion is reasonably exercised under the circumstances of the given case.

It was the duty of the city to have such a plan and profile on file as would readily advise persons of ordinary intelligence of the extent the proposed improvement would affect the plaintiff's lot, and if these so fail to give such information, or give it in such a way as requires one skilled in such work to understand them, and he was not so skilled, then it was competent for plaintiff to go to the city engineer, and seek from him the necessary explanation or information, and to rely upon such explanation and information given in that behalf by the city civil engineer; and it was competent for the engineer to speak in behalf of the city, in giving such information, and if the plaintiff acted in good faith, and did not reasonably have the means of knowledge to the contrary within his reach, it would be proper for him to rely upon the statements of the city engineer as to the extent said improvement would affect his premises, and if he so in good faith relied on said statements, and because thereof accepted said \$100 in satisfaction of his damages, when in fact said grade and improvement cut down in front of his premises, say some two feet more than said city engineer represented to the plaintiff it would, then he would not be barred from maintaining this action, if under the proof and our instructions he otherwise would be entitled to recover. But whether the city engineer misrepresented or not, or whether the cut as made was deeper or not, are facts that you must find from a preponderance of the evidence.

You may treat the proceedings in the probate court, and the payment by the city of the \$100 to plaintiff, as being a settlement of the plaintiff's claim for damages, as he then understood, or had good reason to understand the matter, but, however, subject to be so modified as to correct errors and mistakes, if any occurred, by reason of said statements of the city engineer. So we say to you that if the parties got together and settled the matter of damages for \$100, which was paid pursuant thereto, then the same would be conclusively binding on them, in the absence of mistake, error or misrepresentation inducing the same. But if you find from a preponderance of the evidence that the plaintiff acted with reasonable prudence, and in good faith relied upon said representations of the city engineer, and not knowing to the contrary was deceived thereby, and by reason thereof agreed upon said settlement, he would not be concluded thereby, but he would not thereby be entitled to recover further

damages, unless you find the issues with the plaintiff, as to his right to recover damages, taking our instructions to you as a whole, and in a sum greater than \$100, in which case said \$100 should be treated as having already been paid.

If you find Balch street had an established grade, as defined by us, before 1870, and the plaintiff graded up his lot in 1870 with reference to the then existing established grade, if such was in fact established, such improvement of his lot would entitle him to compensation, if subsequently the city improved said Balch street abutting plaintiff's premises, upon a lower grade of said street, to the extent the same reduced the value of his said lot as hereinafter defined. But it would not entitle the plaintiff to recover for injury to improvements of plaintiff, made subsequent to the establishment of the ordinance grade, by reason of improvements of said street made in accordance with said ordinance grade. If he constructed his dwelling-house and barn and brick walk, and planted his hedge on his said lot so graded, subsequently to the establishment of the ordinance grade, he would be required to do so with reference to said ordinance grade, and if he did not do so, he cannot recover for injuries to them, by reason of improvements of the street to the ordinance grade.

If you find the plaintiff to have failed to support, by a preponderance of the evidence, the issues on his part to be maintained, you need go no further, but return a verdict for the defendant. But if you find the issues with the plaintiff, under our instructions to you, you will ascertain from the evidence what improvements, if any, he made with reference to the established grade, if you find any existed prior to the ordinance of 1882, but not otherwise, and if any such improvements of plaintiff were injured by reason of the change of said grade and the city improvements made pursuant thereto, and to the extent such injuries diminished the value of his premises, he may recover. But for injuries to his improvements made subsequent to the date of the ordinance grade the plaintiff cannot recover, unless you find from the evidence that the city did not make its said street improvement of 1893, pursuant to the ordinance grade of 1882, but made a deeper cut abutting plaintiff's premises, and thereby substantially injured plaintiff's improvements made with reference to said ordinance grade, in which case he would be entitled to recover therefor, but only to the extent that said improvement below said ordinance grade injured the value of his premises.

If you find for the plaintiff you will assess his damages so sustained, which will not be what it would cost to put retaining walls, sodding, or grading his lot down to proper relation to the present street grade, nor the cost of reconstructing his driveway or brick walk to the condition of their former usefulness, but you may consider these in connection with the other evidence to enable you to determine what compensation he ought to have, which should be the difference in the market value of his said premises just before the street improvement was made, and just after, limiting, however, your damages to said premises by reason of the injury to his said improvements made with reference to an established grade, which was changed; if you so find the fact to be, by the improvement of the city, of 1893, and excluding general benefits resulting from said street improvement, such as accrue generally to other abutting lot owners on said street improvement.

Note —The case was tried without objection, on the foregoing basis of estimating the damages. No claim was made for special damages.

HOMICIDE—INSANITY.

[Seneca Common Pleas, December 27, 1895.]

† **STATE OF OHIO v. LEONARD J. MILLER, ALIAS, ETC.**

Insanity is a proper and legitimate defense in criminal prosecutions, and will excuse the commission of a criminal act when it is made to appear affirmatively, by a preponderance of the evidence, that the person committing the act was at the time insane, and that the act in question was the direct consequence of his insanity.

The law recognizes partial as well as general insanity: That a person may be insane upon one or more subjects and sane as to all others. And as regards the guilt or innocence of accused, it makes no difference whether the act charged was produced by general insanity or by an insane delusion regarding some particular person or subject, provided the accused was, at the time of the alleged crime, laboring under an insane delusion, and the act itself was the product of such delusion, and accused did not know or realize that he was doing wrong or committing a crime.

While the defense of insanity is to be regarded as not less full and complete than a humane defense, when satisfactorily established, and while the jury should guard against inflicting the penalty of crime upon the unfortunate person whose mental faculties are deranged or destroyed, the jury should be equally careful that they do not suffer mere theories or opinions, not well sustained by reasons and facts, to furnish protection to guilt.

The law presumes every person who has reached the age of discretion to be of sufficient mental capacity to form the criminal purpose, and to deliberate and to premeditate upon acts which malice, anger, hatred, revenge or other evil disposition might impel him to perpetrate.

To defeat the presumption which thus meets the defense of insanity, the mental alienation relied upon must be affirmatively established, by the defense. It is not sufficient that the evidence barely shows that insanity, general or partial, was possible; the proof must be of such force and character as to annul the legal presumption of sanity and reasonably satisfy the jury that accused was not sane.

Where it appears that the accused at the time of the shooting, and for some weeks or months before, was laboring under the delusion that the community was against him, that his Creator was against him, that his soul was lost, although he may have known right from wrong in the abstract, may have known it was wrong to commit burglary, or larceny, or arson, or take life, yet if these delusions so far dominated his mind and actions that he acted on them and was controlled by them, and the act he did was to any appreciable or considerable degree the product of them, he is not responsible for it.

The opinions of experts, as to the mental condition of accused, based solely upon facts assumed in hypothetical questions, are entitled to greater or less weight according as the facts so assumed may or may not have been established by the evidence, and according to the experience and means of observation enjoyed by such experts, and the care, fairness and impartiality manifested by them while testifying.

The jury should not take for granted that the statements of facts contained in hypothetical questions to the expert witnesses are true; but, on the contrary, should carefully determine, from the evidence, which, if any, of those statements are true.

Such opinions as are based wholly upon a fair statement of all the facts established by the evidence are entitled to much weight with the jury.

Non-expert witnesses, called upon to give their opinions as to the sanity or insanity of accused, are required to state facts upon which such conclusions are based, and are entitled to much, little or no weight according to witnesses' familiarity with accused, their means of knowing and observing him, as well as their manifest intelligence, and fairness or unfairness toward him.

† Affirmed by the circuit court in 7 Circ. Dec., 552.

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11. The mayor of any city of the second class, fourth grade, has jurisdiction in criminal cases throughout the county in which such city is situated, and may by warrant cause any person charged with the commission of a felony or misdemeanor to be arrested and brought before him for the purpose of inquiring into the complaint.
12. And it is the express duty of the marshal of such city to execute all warrants and writs so issued. Such officer and such assistants as he may deem necessary are under the protection of the law while in the exercise of such lawful authority.
13. The officer is not required to produce the warrant or his authority before making the arrest; and if the person to be arrested is armed and prepared to make desperate resistance, and the officer believes and has reason to believe that he will make such resistance if notified of the officer's purpose or if he has knowledge of the officer's purpose, then the officer is not required to even notify the accused of his purpose to make the arrest.
14. The accused has no right to demand an inspection of the warrant until after he has placed himself peaceably in the custody of the officer, knowing him to be such.
15. If the accused, by words or threats, resists arrest and is visibly prepared to make resistance, the officer and his assistants may use any words, resort to any stratagem, or employ any force, which they may deem necessary, to throw accused off his guard, and to overcome the resistance made or threatened, in order to accomplish the arrest without injury to themselves.
16. Where, in making an arrest, a struggle ensues between the officer and the accused, it is the duty of the officer's assistants to come to his aid, whether commanded to do so or not.
17. Where the parties attempting to make the arrest were officers of the law, charged with the duty of taking accused into their custody, and accused knew them to be officers charged with that duty, then he could have no reasonable ground for believing that he was in danger of death or great bodily harm.
18. A thing done with a wicked mind and attended with such circumstances as plainly indicate a heart regardless of social duty and fully bent on mischief, indicates malice within the meaning of the law.
19. The person killed need not be specially in the mind of accused while he is forming the purpose to kill and deliberating and premeditating upon the killing. It is sufficient if the one killed is one of a class deliberated and premeditated upon, against which the design and purpose to kill is directed; as for instance, where accused had formed a willful, deliberate and premeditated design to kill any officer who might come to arrest him.
20. Where it appears, from a preponderance of the evidence, that accused was in his own house about 8:30 o'clock in the evening, after dark, and a man rapped at the door, which was opened by accused, and the man, after some words, not violent in character, was refused admittance; that the wife of accused, a few minutes later, opened the door and the man and another entered the house and spoke to accused, and took seats; and the accused knew they were officers and said: "I will not be taken alive," and the conversation continued quietly for fifteen minutes, the two men, or either of them, saying to accused that they had not come to arrest, that they did not want to take him, and did not duty or tell him that they had a warrant for him, and he did not know it; that while they were talking, the accused sitting six or seven feet from the men, with a gun in his hands or resting across his knees, and when his eyes were somewhat turned aside, one of the men suddenly sprang upon him and seized his gun, and the other also came up and seized it, and a contest followed in which it was discharged, and about the time of the discharge another man rushed into the room and seized accused, violently attempting to push his head aside, as if to strike it against the wall, and while this contest was going on accused drew a pistol and fired; if this firing was done under the belief that it was necessary to save himself from death or great bodily harm, and if accused had reasonable grounds for such belief, the resulting homicide would be justifiable.
21. If the jury find that the shooting was done under circumstances above set forth and in the contest for the possession of the gun as above set forth, and in the midst of that contest, and the circumstances did not justify the fear of death on his part, or of great bodily harm, but a less degree of fear, and in the

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excitement and confusion of the contest he, with malice or purpose to kill, fired the pistol, and that but for the contest of the gun so commenced and carried on the shooting would not have occurred, the accused is guilty of manslaughter only.

22. Although the jury may be satisfied from the evidence that the accused in the afternoon, in conversation with a neighbor, appeared violent and threatened violence to the officers and the whole community, and afterwards, in an orderly, quiet and peaceable manner, transacted business and settled accounts with his neighbor, and that in the evening, when the officers came to his house, he could have killed them, but did not attempt or threaten to do so, but sat down and talked in a quiet and peaceable manner, then the jury may believe him to have abandoned a purpose which he may have had or formed in the afternoon.

CHARGE TO THE JURY.

SCHAUFELBERGER, J.

Gentlemen of the Jury: The defendant, in this case, Leonard J. Miller, otherwise called Levi J. Miller, otherwise called Leon J. Martin, stands charged with the crime of murder in the first degree.

Section 6808, Rev. Stat. of this state, provides that, "Whoever purposely, and of deliberate and premeditated malice * * * kills another is guilty of murder in the first degree."

Section 6810, Rev. Stat., provides that, "Whoever purposely and maliciously," except as provided in sec. 6808, just read, "kills another, is guilty of murder in the second degree."

Section 6811, Rev. Stat., provides that, "Whoever unlawfully kills another," except as provided in the two sections read, viz.: Secs. 6808 and 6810, "is guilty of manslaughter."

The indictment in this case charges in substance that, on October 23, 1895, within the county of Seneca and state of Ohio, Leonard J. Miller, alias Levi J. Miller, alias Leonard J. Martin, in and upon one August Schultz, then and there being, did unlawfully, purposely, and of deliberate and premeditated malice make an assault, in a menacing manner, with intent him, the said August Schultz, unlawfully, purposely, and of deliberate and premeditated malice, to kill and murder; and that the said Leonard J. Miller, alias Levi J. Miller, alias Leon J. Martin, then and there, had and held in one of his hands a certain pistol charged with gunpowder and one leaden bullet, which pistol he then and there, unlawfully, purposely and of deliberate and premeditated malice, did discharge and shoot off against and upon the said August Schultz with intent beforesaid, and, with the leaden bullet aforesaid, out of the pistol aforesaid, by force of the gunpowder aforesaid, by him discharged and shot off as aforesaid, did strike, penetrate and wound the said August Schultz, in and upon the left side of his chest, thereby giving to the said August Schultz, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, in and upon the left side of the chest of the said August Schultz, one mortal wound of the depth of fifteen inches, and of the breadth of one-half of an inch, of which mortal wound he, the said August Schultz, then and there died; and hence the said Leonard J. Miller, alias Levi J. Miller, alias Leon J. Martin, him, the said August Schultz, in the manner and by the means aforesaid, unlawfully, purposely, and of deliberate and premeditated malice, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Ohio.

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To this indictment the defendant, Leonard J. Miller, alias Levi J. Miller, alias Leon J. Martin, has pleaded not guilty. The legal effect of this plea of not guilty is to deny and put in issue each and every material fact contained in the indictment, and every element necessary to convict the defendant of any crime charged or included in the indictment.

In the trial of persons charged with crime, the law raises no presumption of guilt against the accused, but on the contrary, every presumption or the law is in favor of his innocence, and in this case, it will be your duty to acquit the defendant, unless, upon consideration of all the evidence produced on the trial, you are all satisfied, beyond a reasonable doubt, of the truth of each material fact contained in the indictment, and of the existence of every element which is necessary to constitute the crime charged or included in the indictment. This presumption of innocence is not an idle one. It is intended to, and should, inure to the benefit of the defendant upon every material fact which you are called upon to consider, and must be recognized by you in your deliberations. This presumption must not only be overcome by the state, but the state must go further and satisfy each of you, by the evidence, beyond a reasonable doubt, that the defendant is guilty; otherwise, it will be your duty to acquit him.

By the words "reasonable doubt" is meant a doubt which has some good reason for it, arising from the evidence in the case. In other words, a reasonable doubt is that state or condition of mind, which after a fair and full comparison and consideration of all the evidence in the case, both on behalf of the state and the accused, prevents you from saying and feeling to a moral certainty that the defendant is guilty of the crime charged. If you have such doubt, if your conviction of the defendant's guilt, as charged in the indictment, does not amount to a moral certainty, from the evidence in the case, then you are not satisfied beyond a reasonable doubt, and, in that event, it will be your duty to find the defendant not guilty.

A reasonable doubt, however, does not mean a doubt which may arise from a mere whim or caprice. It must be an actual, honest, substantial doubt, arising on a consideration of all the evidence in the case. If, after fairly and fully comparing and considering all the evidence in the case, you can say and feel that you have an abiding conviction of the truth of each material fact contained in the indictment, then you are satisfied beyond a reasonable doubt. And while the law requires each of you to be satisfied, by the evidence, of the defendant's guilt beyond a reasonable doubt, to warrant you in convicting him of the crime charged, it at the same time prohibits you from going outside of the evidence to hunt up doubts upon which to acquit him.

The indictment in this case charges the defendant, Leonard J. Miller, alias Levi J. Miller, alias Leon J. Martin, with the highest crime of felonious homicide known to the law, viz.: Murder in the first degree. The indictment also includes the two lower grades of homicide, viz.: Murder in the second degree and manslaughter; and also the minor offenses of assault and battery, and assault; and under this indictment, according as the evidence may acquire, you may find the defendant not guilty, or guilty of murder in either the first or second degree, or of manslaughter, or of assault and battery, or assault.

The killing of a human being may be either justifiable or excusable, or felonious and criminal. The killing is justifiable when done in the necessary or apparently necessary defense of one's self or family from

death or great bodily harm, attempted to be committed by force. It is excusable when one, in doing a lawful act, by mere accident, unfortunately kills another. When the killing is neither justifiable nor excusable, and the slayer is not insane, it is felonious and criminal, and it may be murder in either the first or second degree, or manslaughter, according as the facts proved on the trial may warrant.

The material facts contained in the indictment in this case are, first, time, viz.: October 23, 1895; secondly, place, viz.: In the county of Seneca and state of Ohio; thirdly, the body of the crime, viz.: That the crime of murder in the first degree, which includes the lower grades of homicide, as already explained to you, was committed in a manner and form as charged in the indictment; and fourthly, identity, viz.: That the defendant, Leonard J. Miller, alias Levi J. Miller, alias Leon J. Martin, is the person who committed that crime.

These facts, together with all the elements which constitute the body of the crime charged, as already explained to you, are denied and put in issue by the defendant's plea of not guilty. In determining these issues you should carefully consider the whole of the evidence, both on behalf of the state and the accused, all the testimony and the circumstances proved on the trial, and give to the several parts of the testimony and to the circumstances proved such weight as you think them entitled to; and in determining the weight to be given to the testimony of the several witnesses who have testified, and you are the sole judges as to how much or how little weight shall be given, it is proper for you to take into consideration their conduct and demeanor on the stand while testifying, their apparent fairness, or bias, if any such appears, their opportunities of knowing what they testified to, the reasonableness of their testimony, and any manifest interest, if any, which they may have in the result of this trial, and give to the testimony of each witness such weight as under all the circumstances you think it entitled to.

One of the defenses interposed on behalf of the accused is, that at the time he is alleged to have committed the crime charged, he was not of sound mind, was at times affected by melancholy, and laboring under certain insane delusions; in other words was insane.

Much testimony has been given on behalf of both the defense and the prosecution which tends to show the defendant's mental condition at, prior and immediately subsequent to the time of the alleged killing; the testimony of relatives, neighbors and acquaintances of the accused, as well as of physicians and medical experts. The statements of witnesses who testify as to actual observations of and communications with, the defendant at various periods of his life, should be carefully received and scrutinized by you, and given such weight, as under the rules already given, you think them entitled to. The opinions of experts, based solely upon facts assumed in the hypothetical questions propounded to them, are entitled to greater or less weight according as the facts so assumed may or may not have been established by the evidence, and according to the experience and means of observation enjoyed by such experts, and the care, fairness and impartiality manifested by them while testifying; and hence, their opinions should be received by you with great caution. You should not take for granted that the statements of facts contained in the hypothetical questions propounded to the expert witnesses are true; on the contrary, you should carefully examine and weigh the evidence and from that determine which, if any, of those statements are true, and which,

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if any, are not true, before giving effect to the opinions based upon such statements; such opinions as are based wholly upon a fair statement of all the facts established by the evidence are entitled to much weight in your consideration of this question. On the other hand, such opinions as are based only upon a partial statement of the facts so established, or upon a statement of facts, some of which have not been so established, are entitled to little or no weight in your considerations.

Many witnesses who are not physicians or experts have also given their opinions as to the sanity or insanity of the accused. These opinions are also to be received and considered by you with caution, and given such weight as you may deem them entitled to. These non-expert witnesses have been required to state the facts upon which they base their opinions in order that you might be enabled the better to test the correctness of their opinions, and the opinions of such witnesses may be entitled to much, little or no weight according to the witnesses, familiarity with the accused, their means of observing him and knowing him as shown by their testimony, as well as their manifest intelligence and fairness, or unfairness, towards him.

Your verdict, on this question of insanity, must be formed upon the facts proved and opinions given by professional and non-professional witnesses on the trial. You have, therefore, both facts and opinions to consider and weigh. The credibility of all witnesses is not the same; the value of all their opinions is not the same. Hence, you must exercise your judgment and good sense and do justice accordingly, basing your judgment upon such facts and opinions as you deem worthy of consideration. The medical testimony given in the case, if without bias in favor of either party, may be a salutary means of assisting you in deciding the case on consistent and sound principles. But, as already explained, such testimony should be received with great caution, and, like the opinions of neighbors and acquaintances, should be regarded as of little weight if not well sustained by reasons and facts that admit of no misconstruction.

Insanity is recognized by the law as a proper and legitimate defense in criminal prosecutions, and will excuse the commission of a criminal act, when it is made to appear affirmatively, by a preponderance of the evidence, that the person committing the act was at the time insane, and that the act in question was a direct consequence of his insanity.

The law recognizes partial as well as general insanity; that a person may be insane upon one or more subjects and sane as to all others; that he may be laboring under an insane delusion upon some particular matter or regarding some particular person, and generally sane upon all other subjects. As regards the guilt or innocence of a person charged with the commission of crime, it makes no difference whether the act charged was produced by general insanity, or by an insane delusion regarding some particular person or subject. If the person charged was at the time of the alleged crime laboring under an insane delusion, and the act itself was the product of such delusion, and the accused at the time did not know or realize that he was doing wrong or committing a crime, then he cannot be held criminally responsible for the act.

On the other hand, although the person charged may, at the time of the alleged crime, have been laboring under insane delusions, yet if the act itself was not the product of such delusion, and the accused at the time knew and realized that he was doing wrong and committing a crime, then the law holds him criminally responsible for the act.

While, then, the defense of insanity is to be regarded as not less full and complete than a humane defense, when satisfactorily established, and while you should guard against inflicting the penalty of crime upon the unfortunate person whose mental faculties are deranged or destroyed, you should be equally careful that you do not suffer mere theories or opinions which are not well sustained by reasons and facts, to furnish protection to guilt.

Was, then, the defendant, at the time of the alleged killing of August Schultz, insane and irresponsible to the law?

In determining this question, you must bear in mind that the law presumes every person who has reached the age of discretion to be of sufficient mental capacity to form the criminal purpose, and to deliberate and to premeditate upon the acts which malice, anger, hatred, revenge or other evil disposition might impel him to perpetrate. To defeat this legal presumption which meets the defense of insanity at the threshold, the mental alienation relied upon by the accused must be affirmatively established by the evidence, and the burden of establishing the insanity of the accused rests upon the defense. It is not sufficient if the evidence barely shows that insanity, general or partial, was possible. The proof must be of such force and character as to annul the legal presumption of sanity; it must reasonably satisfy you that the defendant was not sane. In other words, the defense must satisfy you, by a preponderance of the evidence, that, at the time of the alleged killing of August Schultz, the defendant was affected by insanity, or by some insane delusion, or homicidal mania, to such an extent that he did not know what he was doing, or that he did not know that what he was doing was wrong.

The statute, as you will remember, defines murder in the first degree as the purposely killing of another with deliberate and premeditated malice. Purposely, implies an act of the will, an intention, a design to do the act. It pre-supposes the free agency of the actor; free to act or abstain from action; free to embrace the right and reject the wrong. Deliberation and premeditation require action of the mind. They are operations of the intellectual faculties, and require an exercise of reason, reflection, judgment and decision and it cannot happen in any case where the faculties of the mind are deranged, destroyed, or do not exist. Therefore, the following questions afford a very satisfactory test, and it is the legal test, as to whether the condition of the defendant's mind was such as to render him irresponsible for the alleged crime within the meaning of the law, viz.: First—Was he, the defendant, a free agent in forming the purpose to kill? Second—Was he, at the time the act was committed, capable of judging whether the act was right or wrong? Third—Did he know, at the time, that the act was an offense against the laws of God and man?

If from the evidence you say "No," he is innocent; if "Yes," and you find the killing to have been done purposely, with deliberate and premeditated malice, he is guilty. In other words, if, upon a full consideration of all the evidence in the case, all the testimony and the circumstances proved, you believe from a preponderance of the evidence that the defendant's mental condition was such that he was not a free agent in forming the purpose to kill August Schultz, or that he was not capable of judging whether that act was right or wrong, and did not know, at the time of the fatal shot, that he was committing a crime, then your verdict should be that you find the defendant not guilty by reason of insanity.

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It, on the other hand, you believe from the evidence that the defendant was a free agent in forming the purpose to kill August Schultz, that he was at the time capable of judging whether that act was right or wrong, and that he knew at the time that he was committing a crime, then the law holds him criminally responsible for the act done.

Another defense urged on behalf of the accused is, that the killing of August Schultz was justifiable on the ground of self-defense. This defense, like that of insanity, to be available as a defense, must be affirmatively established by the evidence, and the burden of proving the facts which are necessary to justify the homicide rests upon the defendant.

Under the law of this state homicide is excusable on the ground of self-defense only under the following circumstances, each of which must be established by the accused, by a preponderance of the evidence, to authorize a verdict of acquittal, viz.: The slayer, in the careful and proper use of his faculties, must believe in good faith: First, that he is in imminent danger of death or great bodily harm; although in fact he may be mistaken as to the existence, or imminence of danger. Second, that his only means of escape consists in taking the life of his assailant. And, third, there must be reasonable ground for such belief.

In order to determine whether or not the defendant, at the time and place of the alleged killing, believed in good faith that he was in imminent danger of death or great bodily harm, and had reasonable grounds for such belief, it is proper that you should understand the rights and duties of Marshal Schultz and his assistants, as well as those of the defendant.

Under the laws of this state, the mayor of any city of the second class, fourth grade, has jurisdiction, in criminal cases, throughout the county in which such city is situated, and may, by warrant issued by him, cause any person charged with the commission of a felony or misdemeanor to be arrested and brought before himself for the purpose of inquiring into the complaint; and it is by law made the express duty of the marshal of such city to execute all warrants and writs so issued and directed to him by the mayor. He must forthwith arrest and bring before the mayor the person or persons named in such warrant, and his jurisdiction for that purpose is co-extensive with the county. And in this case, if you believe from the evidence that the city of Tiffin, in Seneca county, was at the time in question a city of the second class, fourth grade, and exercising the functions of such city, that August Schultz was the marshal thereof, that the mayor of said city issued a warrant directed to said marshal for the arrest of the defendant, and that the defendant was then within Seneca county, then you will be justified in finding not only that August Schultz was duly authorized to arrest the defendant, but that it was his peremptory duty under the law to arrest him wheresoever found within the limits of the county.

An officer having authority to arrest is under the protection of the law, while in the lawful exercise of that authority. He may take with him such assistance as he may deem necessary, and such assistance, and every one coming to the officer's aid, and in good faith lending his assistance, whether commanded or not, are under the same protection as the officer himself. If being such officer's duty to make the arrest, the law clothes him with the power to accomplish the result. His duty is to overcome all resistance and bring the party to be arrested under physical restraint, and the means he may use are so extensive with the duty. The officer is not required to produce the warrant or authority before making the arrest:

and if the person to be arrested is armed and prepared to make desperate resistance, and the officer believes and has reason to believe that he will make such resistance if notified of the officer's purpose, or if he has knowledge of the officer's purpose, then the officer is not required to even notify the accused that he has a warrant for his arrest, or to advise the accused of his purpose to make the arrest. The officer should first make the arrest, then he may explain why he made the arrest and then, if the accused desires it, the officer should produce his warrant or authority for making the arrest. The accused has no right to demand an inspection of the warrant until after he has placed himself peaceably into the custody of the officer, knowing him to be such. If the accused by words or threats resist arrest and is visibly prepared to make resistance, the officer and his assistants may use any words, resort to any stratagem, or employ any force, which they may deem necessary, to throw the accused off his guard, and to overcome the resistance made, or threatened, in order to accomplish the arrest without injury to themselves.

Hence in this case, if you believe from the evidence that August Schultz, as marshal of the city of Tiffin, was, at the time in question, authorized and had a warrant for the arrest of the defendant, then it follows as a matter of law that he had a right to take with him Officer Sweeney and Abraham Sheidler to assist him, and if after arriving at defendant's house and gaining admittance, you believe from the evidence, that he, the defendant, made threats of resistance by declaring that he would not be taken alive, and was armed with deadly weapons and visibly prepared to make desperate resistance, then Marshal Schultz was not required to produce his warrant to the defendant; nor was he required to notify defendant that he had a warrant, or even that he intended to arrest him, if in good faith he believed, and had good reasons to believe, that by giving such notice, serious injury would result to himself or assistants. The marshal's warrant was a protection to him and his assistants for all words or acts reasonably necessary for its execution, and if a struggle ensued between the defendant and the marshal and Officer Sweeney, Mr. Sheidler had a right, and it was his duty, to come to the officer's aid and give his assistance, whether commanded by Marshal Schultz or not.

On the part of the defendant, it was his duty, knowing, or having reason to believe, that Schultz and Sweeney were officers of the law in the discharge of their official duties, to yield himself immediately and peaceably into their custody. If they were officers of the law charged with the duty of taking the defendant into their custody, and the defendant knew them to be officers charged with that duty, then he could have no reasonable grounds for believing that he was in danger of death or great bodily harm.

So that upon the question of self defense, if you believe from a preponderance of the evidence, and the circumstances proved, that the defendant did not know, or have reason to believe, that August Schultz and Patrick Sweeney were officers of the law in the discharge of their official duty, at the time and place of the homicide, and that he in the careful and proper use of such faculties as he had, believed, in good faith, that he was in imminent danger of death, or great bodily harm, and that his only means of escape consisted in taking the life of his assailants, and that, under the circumstances, he had reasonable grounds for such belief, then you would be warranted in finding that the killing was justifiable on the

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ground of self defense, although in fact the defendant may have been mistaken as to the existence or imminence of danger.

On the other hand, if you believe from the evidence and the circumstances proved that the defendant, at the time and place of the killing, knew, or had reason to believe, that Mr. Schultz and Mr. Sweeney were officers of the law charged with the duty of arresting him, and that, instead of yielding himself peaceably into their custody, he threatened and was prepared to resist arrest and declared that he would not be taken alive, and that one of the officers, August Schultz, while undertaking to disarm the defendant and place him under arrest, was by him killed, and that the defendant was not at the time insane to the extent of being irresponsible for his acts, as already explained to you, then the law holds him criminally responsible for the act done, and you would not be warranted in finding that the killing was justifiable on the ground of self defense.

Under the instructions given you by the court, your inquiries then should be, whether the defendant, Leonard J. Miller, alias Levi J. Miller, alias Leon J. Martin, within the county of Seneca and state of Ohio, killed August Schultz, at the time and in the manner and form as charged in the indictment; whether such killing was justifiable or excusable, or was felonious and criminal; whether at the time of such killing he was insane; and whether such killing was murder in the first degree, murder in the second degree, or manslaughter, as defined in the statutes.

You will remember that the identity of the defendant, as the person who committed the alleged crime, is one of the material facts contained in the indictment, as are also the alleged facts that such crime was committed in this county and state, and on October 23, 1895; and to justify a conviction in this case, you must not only be satisfied that the body of the crime charged was committed but you must also be satisfied beyond a reasonable doubt, that the defendant, Leonard J. Miller, alias Levi J. Miller, alias Leon J. Martin, who is here on trial, is the same person who is named in the indictment, and who committed the alleged crime, and that such crime was committed within the county of Seneca and state of Ohio, at the time stated in the indictment.

It is also incumbent on the state, to justify a conviction in this case, to show by the evidence, beyond a reasonable doubt, that August Schultz came to his death by reason of a pistol wound inflicted on him by the defendant; in other words, that the defendant killed him by shooting him with a pistol, or other fire-arm of like character. The wound must have been inflicted with a pistol, or similar weapon, in the hand of the defendant, and must have been the immediate and efficient cause of death. And if you believe from the evidence, beyond a reasonable doubt, that the defendant, by shooting a leaden bullet from a pistol, or like weapon, inflicted a wound upon the left side of the chest of August Schultz, that such bullet penetrated his body, and the wound thereby made was in itself mortal, and reasonably calculated, from its nature and extent, to produce death, and that it did in fact contribute directly to his death, then, no matter how much or how little time elapsed between the inflicting of the wound and the death of Mr. Schultz, you will be justified in finding that the defendant killed August Schultz; otherwise, it will be your duty to acquit him.

If you find that the defendant did kill August Schultz, in manner and form as charged in the indictment, then you should inquire whether such killing was justifiable or excusable, as already defined to you, and whether the defendant at the time of the killing was insane to the extent that he

was not criminally responsible for the act, as has been explained to you. You will bear in mind that the burden of establishing the defense of insanity, as well as the defense that the killing was justifiable, rests upon the defendant, and that he must satisfy you by a preponderance of the evidence that he was insane, or of the existence of the facts which in law constitutes self-defense, before you will be warranted in finding, either that he was insane, or that he was justified in taking the life of Mr. Schultz on the ground of self-defense. If you believe from a preponderance of the evidence, under the instructions given you, that the killing of August Schultz was justifiable or excusable, on the part of the defendant, or that, at time of the killing, he was insane to the extent of not being criminally responsible for the act, as has been explained to you, then in either of these cases you will not be warranted in finding the defendant guilty.

But if you believe from the evidence, beyond a reasonable doubt, that the defendant, at the time and place, and in the manner and form charged in the indictment, killed August Schultz, and the defendant has failed to satisfy you by a preponderance of the evidence that such killing was justifiable or excusable, or that he was insane, then you will be warranted in finding that the killing was felonious and criminal, and it will be your duty to find the defendant guilty; and you should then inquire whether the crime was murder in the first degree, murder in the second degree, or manslaughter.

You will remember that the statute defines murder in the first degree as purposely, and of deliberate and premeditated malice, killing another; and murder in the second degree as purposely and maliciously, but without deliberate and premeditated malice, killing another; and manslaughter as unlawfully, but without deliberate and premeditated malice, and not purposely or maliciously, killing another.

Thus, if the killing was unlawful only, but without a purpose or intent to kill, and without deliberate and premeditated malice, the degree of crime is manslaughter; if the killing was unlawful and malicious and without a purpose and intent to kill, but without deliberate and premeditated malice, then the degree of crime is murder in the second degree; if all these elements were present, if the killing was unlawful and malicious, with deliberate and premeditated malice, and without a purpose and intent to kill, then the degree of crime is murder in the first degree; and in this case, if you find the defendant guilty, it will be your duty to say that you find him either guilty of manslaughter, or murder in the second degree, or murder in the first degree, according as the elements which constitute these respective degrees of homicidal crime have been established by the evidence beyond a reasonable doubt.

Any killing of another that is not justifiable or excusable, and wherein the slayer is not insane, is an unlawful killing within the meaning of the law.

Malice, within the meaning of the law, includes not only anger, hatred and revenge, but every other unlawful and unjustifiable motive. In a case of homicide, it is not confined to particular ill will or animosity against the deceased, but is intended to denote the state of mind which prompts a conscious violation of the law to the prejudice of another. A thing done with a wicked mind and attended with such circumstances as plainly indicate a heart regardless of social duty and fully bent on mischief, indicates malice within the meaning of the law; and malice is implied in law from any willful and criminal act, unless

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the evidence shows that the accused was acting from some innocent or proper motive, or the act was the product of his insanity.

Upon the question of intent, the law presumes a man to intend the reasonable and natural consequences of any act deliberately done. The law presumes that every sane person contemplates and intends the natural ordinary, and usual consequences of his own voluntary acts, unless the contrary appears from the evidence. If a man is shown by the evidence, beyond a reasonable doubt, to have killed another by any voluntary act, the natural and ordinary consequences of which would produce death, then it will be presumed that the death of the deceased was intended by the slayer, unless the facts and circumstances of the killing, as shown by the evidence, create a reasonable doubt as to whether the killing was done purposely or intentionally. An intent or purpose to kill must be present in the mind of the slayer at the time and place of the assault; and the assault must be made in the execution of that purpose, to be purposely killing within the meaning of the law, and the purpose or intent may be inferred from the facts and circumstances proved on the trial, from what was said and done by the accused, the manner of inflicting the wounds, the instrument used, and its tendency to destroy life. The intent need not be directed to the person killed. If the accused has formed a purpose to kill any person, and makes an assault in execution of that purpose, but by mistake, or unintentionally, kills another person than the one intended the law holds him just as guilty as if the wound inflicted had taken effect upon the person for whom it was intended.

To constitute deliberate and premeditated malice, within the meaning of the law, the intention to kill must have been deliberated upon, and the design to do it formed before the act which resulted in death was done. If a person has actually formed the purpose maliciously to kill, and deliberated and premeditated upon it before he performs the act, he is guilty of purposely, and of deliberate and premeditated malice, killing another, however short the time may have been between the formation of the purpose to kill and its execution. It is not the time of deliberation and premeditation that is requisite, but the actual existence of the purpose, malice, deliberation and premeditation.

The person killed need not be specifically in the defendant's mind while the latter is forming the purpose to kill and deliberating and premeditating upon the killing. It is sufficient if the one killed is one of a class deliberated and premeditated upon against which the design and purpose to kill is directed.

So that in this case, if you believe from the evidence, beyond a reasonable doubt, that the defendant unlawfully, purposely and maliciously shot and killed August Schultz, as charged in the indictment, and that before, or at the time the fatal wound was given, the defendant had formed in his mind a willful, deliberate and premeditated design or purpose to take his life, or the life of any officer who might come to arrest him, and that the wound was inflicted in furtherance of that design or purpose, and without any justifiable cause, or legal excuse therefor, as explained in these instructions, then you are authorized to find that the defendant purposely and of deliberate and premeditated malice killed August Schultz.

In conclusion let me say to you, gentlemen, that under the instructions given you by the court, as to the law which is applicable to this

case, and which must govern you in the determination of the questions involved, you should scrutinize and weigh with great care all the testimony and the circumstances proved, and give the case calm, serious, impartial and just consideration, and then,

If the state has failed to satisfy each of you, by the evidence, beyond a reasonable doubt, that the defendant, on October 23, 1895, within the county of Seneca and state of Ohio, shot and killed August Schultz, in manner and form as charged in the indictment, or if the defendant has satisfied you by a preponderance of the evidence that such killing was justifiable or excusable, as explained to you, then, in either of these cases, you should acquit the defendant, and your verdict should be not guilty.

If you believe from the evidence that, at the time and place stated in the indictment, the defendant killed August Schultz, and if the defendant has satisfied you, by a preponderance of the evidence, that, at the time of such killing, he was insane to the extent that he was not criminally responsible for the act, as already explained to you, then your verdict should be not guilty because of insanity.

If the state has satisfied you by the evidence, beyond a reasonable doubt, that the defendant, at the time and place, and in manner and form charged in the indictment, did unlawfully kill August Schultz, but has done purposely, and of deliberate and premeditated malice, then your verdict should be guilty of manslaughter.

If the state has satisfied you, beyond a reasonable doubt, that the defendant, at the time and place, and in manner and form charged in the indictment, did unlawfully, purposely and maliciously kill August Schultz, but has failed to satisfy you beyond such doubt that such unlawful killing was of deliberate and premeditated malice, then your verdict should be guilty of murder in the second degree.

If the state has satisfied each of you, by the evidence, beyond a reasonable doubt, that on October 23, 1895, in the county of Seneca and state of Ohio, the defendant did unlawfully, purposely, and of deliberate and premeditated malice, kill August Schultz in the manner and by the means stated in the indictment, then your verdict should be guilty as he stands charged in the indictment, which means murder in the first degree.

And now, gentlemen, the case is with you. You all deserve special commendation from the court for the considerate manner in which you have conducted yourselves, and for the patience, care, and close attention manifested by you in listening to the testimony of witnesses and argument of counsel during the trial. It is now your duty to consider well the evidence, under the instructions given you by the court, and agree upon a verdict. You should perform that duty calmly and fearlessly. Your verdict is equally important to the state and to the defendant. Neither can ask it at the expense of the rights of the other. Into the deliberations upon which it is made up, there should enter neither vengeance nor pity. It should proceed from your uncolored, dispassionate judgments. A vision clear to see, and a courage to pronounce the right thing, unmindful of favor or disappointment to any one, is the fine quality of a right-minded juror.

The following requests were given as modified and approved.

Request No. 2 as charged: "If the jury find from a preponderance of the evidence in the case that the defendant was in his own house, about 8:30 o'clock in the evening, after dark, and a man rapped at the front door of the house, and the defendant opened the door, and after some words of

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no violent character, the defendant refused the man outside admittance to the house and shut the door, and that the wife of the defendant, a few minutes later, opened the door, and the man outside the house and another entered and spoke to the defendant; and the two men took seats; and the defendant knew they were officers, and the defendant said, in substance: 'I will not be taken alive,' and the conversation continued there quietly for perhaps fifteen minutes, and the two men, or either of them, said to the defendant that they had not come to arrest him, that they did not want to take him and they did not notify or tell him they had a warrant for him, and he did not know that they had a warrant for his arrest, and that while the officers were talking to him he was sitting on a chair in the corner of the room, about six or seven feet from the men with whom he had been talking, with a gun in his hands, or resting across his knees; and when his eyes were somewhat turned aside, one of them suddenly sprang upon him and seized his gun, and the other immediately came up and also seized it, and a scuffle or contest followed for the possession of the gun, and in the contest it was discharged. And about the time of the discharge of the gun another man rushed into the room from the outside and seized the defendant violently by his left arm with one hand, and with the other pushed his head aside as if to strike it against the wall, and while this contest was going on violently, the defendant drew a pistol he had on his person and fired; if this firing was done under the belief on his part that it was necessary, or if it appeared to him to be necessary, to save himself from death or great bodily harm, and if you find from the evidence that the defendant had reasonable grounds for such belief, and the death of August Shultz resulted from the firing of the pistol, the death thus caused would be excusable, and the defendant would not be guilty."

Request No. 3 as charged: "And further, if the jury shall find that the shooting was done under the circumstances above set forth, and in the contest for the possession of the gun as above set forth, and in the midst of that contest, and the circumstances did not justify the fear on his part of death or great bodily harm, but a less degree of fear, and in the excitement and confusion of the contest, he, without malice or a purpose to kill, fired the pistol, and that but for the contest of the gun so commenced and carried on the shooting would not have occurred; the defendant is guilty of manslaughter only."

Request No. 4 as charged: "Although the jury may be satisfied from the evidence that the defendant on the afternoon, in conversation with a neighbor, appeared violent and threatened violence to the officers and the whole community, and afterwards in an orderly, quiet and peaceable manner transacted business and settled accounts with his neighbor, and that in the evening when the officers came to his house he could have killed the officers, but did not do so, or attempt or threaten to do so, but sat down and talked with the officers in a peaceable and quiet manner, then the jury may believe him to have abandoned any purpose which he may have had or formed in the afternoon, and if the shooting was not done in pursuance of the settled purpose as indicated by his actions in the afternoon, but as the result of a sudden, unexpected and vigorous contest of force for the possession of a gun in his hands, and was done solely in the excitement of that contest, these facts would strongly tend to prove that the act was not done with premeditation and deliberation, and without such premeditation and deliberation, the defendant would not be guilty of murder in the first degree. And further, if the killing was done under these circumstances, but without malice on

the part of the defendant, in that case he would not be guilty of murder in the second degree."

Request No. 6 refused: "If the jury find that the defendant, at the time of the shooting and for some weeks or months before, was laboring under the delusion that the community was against him, that his Creator was against him, that his soul was lost, although he may have known right from wrong in the abstract, may have known it was wrong to commit burglary, or larceny, or arson, or take life, yet if these delusions so far dominated his mind and actions that he acted on them and was controlled by them, and the act he did was to any appreciable or considerable degree the product of them, he is not guilty."

Request No. 7 as charged: "The defense of insanity presented in this case is entitled to your full and impartial consideration. It is necessary for the defendant to establish the defense of insanity by a preponderance of the evidence. To the commission of the crime of murder in the first degree, mental capacity for deliberation and premeditation is essential. If the evidence shows that this essential capacity was probably wanting, or, if you believe from a preponderance of the evidence that the accused was insane when the homicide was committed, that at the time he was actuated by insane delusions, then there may be reasonable and substantial doubt of his capacity for deliberation and premeditation. If the homicide was committed in a manner that would be criminal and unlawful if the accused were sane, the verdict should nevertheless be not guilty, if the killing was the offspring or product of mental disease in the defendant."

FALSE IMPRISONMENT—MALICIOUS PROSECUTIONS.

[Franklin Common Pleas, 1897.]

FANNIE L. JOHNSON V. MCDANIEL AND JOHNSON.

1. A pure, naked, unlawful detention, unaffected by any question of motive or purpose, constitutes false imprisonment.
2. Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he or she is charged.
3. Where the person instituting a prosecution omits to make such inquiry and investigation into the conduct of the accused as would have suggested itself to an ordinarily prudent person, and such investigation would have discovered that accused was not guilty of the offense, the accused is not absolved on the ground of reasonable cause.
4. The fact that accused has uniformly borne a good reputation as a law abiding and well behaved person, and that accuser knew that such was his or her reputation, is a fact to be considered in determining whether or not accuser had reasonable cause to believe accused guilty of the offense.
5. In proof of malice it is not necessary to show personal grudge or ill-will or hatred. It is sufficient if the evidence shows that the accuser, in the beginning and conducting the prosecution, showed a gross, wanton, reckless disregard of the rights of the accused. The jury may infer malice, legal malice, from want of probable cause for the prosecution.
6. If the accuser took pains to obtain all the facts which, by reasonable diligence, could be obtained, and submitted them truthfully to counsel, a reputable attorney, and if the attorney advised accuser that he had ground for prosecuting accused, and if the prosecution was carried on in the honest belief that there was ground for it, the accuser is relieved from the imputation of malice, although the prosecution failed, and, as a matter of fact, the advice of the attorney was erroneous.

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7. The fact that accuser consulted an attorney, and acted on his advice, may also be considered as mitigating the damage.
8. As part of the compensatory damages, the jury may assess that which will compensate accused for the injury done to character, reputation and credit by the prosecution,
9. The jury may also assess a reasonable attorney fee for counsel employed by accused, and also for the value of time consumed in making defense to the prosecution.
10. Remuneration for mortification, humiliation and shame and anguish of mind suffered by reason of arrest and imprisonment may be included in compensatory damages.
11. And the fact that accused was incarcerated in a filthy cell, and was not allowed any food or water for eight hours, and, together with her husband, was separated during that time from her young child, may be considered by the jury in determining whether the arrest and imprisonment amounted to personal insult and indignity to her, which could necessarily, or probably, impair her bodily health and wound her feelings, producing mental anguish.
12. When the accuser, in beginning and conducting the prosecution, was swayed by actual malice, in contradistinction from legal malice, the jury may give exemplary or positive damages.
13. In estimating exemplary damages, the jury may consider the standing of the parties. Such evidence is admitted to enable the jury to determine how much accused has been injured, but not for the purpose of determining defendant's ability to respond in damages.
14. A man of high character and known force and influence in the community may injure another by wrongfully prosecuting him, more than a man of less character could do.
15. On the other hand, if the accused had a well established character or reputation, there is less probability of the wrongful criminal prosecution injuring than if such person was new in the community, just starting in an effort to build up a reputation.

CHARGE TO THE JURY.

PUGH, J.

Gentlemen of the Jury: This action is brought by the plaintiff to recover damages claimed in consequence of the plaintiff's alleged false and illegal arrest and imprisonment. False imprisonment is the unlawful restraint of a person against his will, either with or without process. It is a trespass to the person, committed by one against another, by unlawfully arresting and detaining him or her against his or her will. It is a direct wrong, or illegal act, in which the defendants must have participated, or which must have been in their direct or indirect procurement.

These facts are requisite to constitute the wrong: (1) Detention of the person of the plaintiff; (2) The unlawfulness of the detention.

A pure, naked, unlawful detention, unaffected by any question of motive or purpose, constitutes false imprisonment. The want of unlawful authority is an essential element of the wrong.

The substance of the plaintiff's petition is, that on August 31, 1896 the defendants falsely, maliciously, and without probable cause charged the plaintiff, in the police court of this city, with having committed the offense of malicious destruction of property belonging to the defendants, to the amount of \$35; that they procured the clerk of that court to issue a warrant for her arrest, which he issued; and thereupon three policemen arrested her, took her to and confined her in a cell that was filthy and infested with vermin, of the city prison, without anything to eat or drink, for the space of eight hours; and that on the trial of the case, before the police court, she was acquitted of the charge. She charges that she was thereby insulted, humiliated and injured in her credit and reputation; and

that by reason of the alleged acts of the defendants, she suffered great pain and anguish of body and mind, and that her health was seriously impaired, and that she has since been confined to bed under the care of a physician.

The answer of the defendants admits that the plaintiff was arrested on a warrant procured by them; but they deny that they falsely, maliciously and without probable cause procured her arrest, or that they had anything to do with the time and manner of her arrest, or that, as a result of her arrest and imprisonment, and of the treatment to which she was subjected, her health was seriously impaired, or that she has since been confined under the care of a physician, or has been subjected to much humiliation, physical and mental anguish, or that the cell in which she was confined was filthy and infested with vermin.

The defendants having admitted that the plaintiff was arrested and the criminal case with malicious destruction of property to the amount of \$35: that she was arrested by three policemen on a warrant whose issuance was procured by them; that the plaintiff was confined in the city prison about eight hours, and compelled to give bail; and that on the trial of the case in police court, she was acquitted, and that that prosecution is fully ended and determined.

The burden of proving all the facts necessary to entitle the plaintiff to recover, except those which are admitted, rested upon the plaintiff, and she could only discharge the burden by proving them by a preponderance of the evidence.

The defendants, having admitted that the plaintiff was arrested and imprisoned on a warrant which they procured to be issued, the plaintiff did not have to prove those essential facts.

The first inquiry and determination which you will have to make, on the evidence, and under this charge, is whether the arrest and also imprisonment were without reasonable cause.

The burden of proving the want of reasonable cause was upon the plaintiff.

The question is, did the defendants have reasonable or probable cause to warrant them in the belief that the plaintiff had committed the offense charged in the affidavit of the defendant, Johnson, and in the warrant, in virtue of which she was arrested by the officers, namely, malicious destruction of their property? Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he or she is charged. It does not depend upon the guilt or innocence of the accused person, or upon the fact that the crime has been committed. In making the criminal accusation against the plaintiff, in the police court, the defendants had a right to act upon appearances; and, if the apparent facts were such that a discreet and prudent person would have been led to the belief that the offense charged had been committed by the plaintiff, they were justified, although it turned out that they were deceived, and that the plaintiff was innocent of the offense. This rule is founded upon grounds of public policy in order to encourage the exposure and punishment of crime. Public policy requires that a person be protected who, in good faith, and upon reasonable grounds, causes an arrest upon a criminal charge, and the law will not subject him to liability therefor. But a groundless suspicion, unwarranted by the conduct of the accused, or by facts known to the ac-

cuser, when the accusation is made, and which would not be strong enough to warrant a cautious person in believing the accused guilty, will not exempt the accuser from liability to the accused for damages in causing his arrest. It is not the right of every citizen to arrest, or to cause to be arrested, another, or to deprive him, or her, of his, or her, liberty. That right can never exist except a legal justification exist for it. The presumption that all men, or women, are innocent, makes the treatment of them as criminals, without justification, a wrong.

The mere belief of the defendants that they had reasonable cause for prosecuting the plaintiff, was not sufficient. It must have been an honest and sincere belief and it must have been based upon reasonable grounds.

It appears from the evidence that the defendant, Johnson, verified the affidavit upon which the warrant in the criminal prosecution was issued; and the affidavit charges that the plaintiff, on August 20, 1896, willfully and maliciously injured and destroyed the property in question, by cutting ten sash cords and one panel door and otherwise destroyed said property. Johnson made the affidavit solely upon representations which had been made to him by the defendant, McDaniell. McDaniell testified that he obtained and knew the following facts: That a hook and staple, or hooks and staples were driven into one of the doors; that four or five or six feet of the paper had been torn off of one of the walls of the house, and a good lot of it was lying on the floor; that two or three of the window cords had been cut off or broken; that Mrs. Lyons had told him that she had heard some one who, she supposed, was the plaintiff, say that they would do whatever injury to the property they could. McDaniell and Johnson also testified that the house was in good condition when the plaintiff and her husband moved into it. The plaintiff offered the testimony of herself and others tending to disprove some or all of the testimony of McDaniell and Johnson. It is not necessary to detail that testimony, in view of the purpose for which I quote the testimony of McDaniell. Whether the matters about which McDaniell and Johnson testified and to which I have just referred are true or not, and whether, if they were true, they knew of them, are questions of fact which it is your exclusive province to decide.

If you disbelieve the testimony of McDaniell and Johnson and believe the opposing testimony offered by the plaintiff, as to the matters just mentioned, there was no probable cause for the criminal prosecution of the plaintiff.

But, if you should believe the testimony of McDaniell and Johnson: in other words, if you should believe that McDaniell, after the plaintiff and her husband vacated the house, found that two or more window cords had been cut or broken; that four or five or six feet of the wall paper had been torn off and a good lot of it was lying on the floor; that a hook or staple, or hooks and staples, had been driven into the door; that Mrs. Lyons told McDaniell that the plaintiff had threatened to do all the harm they could to the property; and, if you further believe from the testimony that the said McDaniell imparted these facts to Johnson before he verified the affidavit; and, if you further believe from the evidence that the house was in good condition, when the plaintiff and her husband moved into it, and it is not probable that other persons had access to the house, and had cut or broken the window cords, and had driven hooks, staples into the door, and had torn off the paper from the wall, then, the question for you to determine is, whether an ordinarily prudent person would have been led to believe, from these facts, that the plaintiff was guilty of the offense charged in the affidavit. If your conclusion should

be that an ordinarily prudent person would not by these facts have been persuaded to believe that the plaintiff was thus guilty, then, there was no probable cause for the prosecution. On the other hand, if you should conclude that an ordinarily prudent person would have believed, from these facts, that she was guilty, then, there was reasonable cause for the prosecution.

Again, if you should find from the evidence that the defendants omitted to make such inquiry and investigation into the conduct of the plaintiff as would have suggested itself to an ordinary prudent person, and that such investigation would have discovered the fact that the plaintiff was not guilty of the offense charged in the affidavit, then, the defendant can not be absolved on the ground that there was reasonable cause to believe that she was guilty.

If you believe from the evidence that the plaintiff, up to the time of her arrest, had uniformly borne a good reputation as a law abiding and well behaved person, and that the defendants knew that such was her reputation, then, that fact is a proper one to be considered, in connection with all the other facts in the case, in determining whether or not the defendants had a reasonable cause to believe, and did believe, in good faith, that the plaintiff was guilty of the offense charged against her.

It was also incumbent upon the plaintiff in this case to prove that the defendants were actuated by malice in their conduct, namely, in instituting and carrying on the criminal prosecution against her, in the police court.

It is not easy to define what the law means by malice. It embraces ill-will, hatred, jealousy, revenge, and like feelings. This is called actual malice. If the defendants were impelled by such feelings against the plaintiff, this branch of the case is made out.

But this is not all the law means by malice. It was not necessary to prove that the defendants had any personal grudge or ill-will or hatred for the plaintiff when they prosecuted her. If the evidence satisfies you that the defendants, in beginning and conducting the criminal prosecution against the plaintiff, showed a gross, wanton, reckless disregard of the plaintiff's rights; if you find that there was no excuse for such a proceeding upon their part; if you find there was no reasonable ground for it—then, although the evidence fails to prove that they entertained any personal ill-will or hatred toward the plaintiff, you would be justified in finding that their action was malicious. That would be evidence tending to prove legal malice. While this is true, still you must be satisfied that the prosecution was instituted and carried on maliciously, by the defendants.

The questions for you to decide, on this branch of the case, are: Had the defendants, or either of them, any ill-feeling, any ill-will, towards the plaintiff, or any desire to wrongfully prosecute and punish the plaintiff?

Was it to wrong or injure her in any way that that prosecution was instituted and carried on? Or was it done simply from an honest, sincere belief—erroneous though it might be—that she was guilty of the offense charged?

You will see from what I have said that the plaintiff had to prove two facts to entitle her to a verdict. The law does not allow her to recover

damages simply because a criminal prosecution was begun and carried on against her. It requires more than this fact. She has to prove that there was no probable, or reasonable, cause for the prosecution, and that the defendants were actuated by malice. These two facts must co-exist, they must concur, to sustain this action. The existence and proof of either of them, without the other, is not enough to authorize a verdict.

It is competent for you to infer malice, legal malice, from the want of probable cause for the prosecution, if you find that to be a fact.

As part of their defense, the defendants rely upon the advice of an attorney. They claim that, before they began the criminal prosecution against the plaintiff, they consulted with, and were advised by, an attorney to institute the prosecution.

Whether this can avail them anything depends upon whether they did what the law, in such a case, required of them. If they took the pains to inform themselves of all the facts which, by reasonable diligence, could be obtained, submitted them all truthfully to their counsel, a reputable attorney, omitting none; and if the attorney advised them that they had ground for prosecuting the plaintiff; and, then, if the defendants, taking the advice of the attorney, instituted the criminal prosecution and carried it on afterwards, in the honest belief that they had reasonable ground for it, this relieves them from the imputation of malice, although the prosecution failed, and, as a matter of fact the advice of the attorney was erroneous. If the evidence satisfied you that it rebuts the charge of malice, it defeats the plaintiff's case; because there can be no verdict in her favor unless malice has been proved.

The fact that the defendants consulted an attorney, and acted on his advice, if it has been proved, may be considered also as mitigating the damages.

But, if you are satisfied, from all the facts proved in the case, that, notwithstanding the advice of the attorney, there was a malicious intention on the part of the defendants to injure the plaintiff, or that there was an unreasonable and reckless disregard to her rights by them, or that the true facts were not stated to the attorney; or that there was no honest belief entertained by them in the existence of a cause for the prosecution, and no bona fide reliance upon the advice of the attorney, but that it was sought merely as a cloak to do the plaintiff a wrong, you should not conclude that the charge of malice has been negatived or disproved; nor should you in that case consider it as mitigating the damages.

The value and effect of obtaining and bona fide relying upon the advice of a reputable lawyer is, as I have told you, to prima facie rebut the charge of malice against the defendants; and it imposes the duty upon the plaintiff to bring home to the defendants the existence of malice as the true motive of their conduct.

Whether these facts, if they are proved, are to have that effect and value is for you to determine. Like all of the other facts in the case they are to have that effect which you, taking all of the other facts proved, choose to give them.

It is for your wisdom to determine their weight and value, under the circumstances of the case, as bearing upon the question of malice and the amount of the damages.

If you find that there was reasonable cause for the arrest and the prosecution of the plaintiff, you will return a verdict for the defendants. Your verdict will also be for them, if you find that they were not actuated

by malice, although you may conclude that the prosecution was without reasonable cause.

If, however, you find from the whole evidence and under these instructions that the plaintiff is entitled to recover, you will proceed to the consideration and decision of the question of damages. Damages may be compensatory, and they may be exemplary or punitive. Compensatory damages are for the purpose of making the plaintiff whole for the injury done to her character and reputation, and for injury to her feelings, for humiliation and anguish of mind.

There is no inflexible standard by which the damage can be measured or estimated.

Characters have no market price, as horses, cattle and other property have.

The extent of the injury must be determined from the evidence. You must exercise your sound judgment and discretion and defer to your sense of justice. You have a right, and it is your duty, to consider all of the circumstances of the case.

As part of the compensatory damages, you can assess a reasonable attorney's fee for the plaintiff to pay counsel for defending her in the police court, and also whatever may be the value of the time that was consumed by her in making that defense.

As part of the compensatory damages, you can also assess damages which will compensate her for the injury that may have been done to her character, reputation and credit by the initiation and prosecution of the charge in the police court.

You can also incorporate in your verdict, as compensatory damages, what will remunerate the plaintiff for the mortification humiliation and shame suffered by her by reason of the arrest and imprisonment.

If you find the fact to be that the plaintiff was incarcerated in a filthy cell, and was not allowed any food or water for eight hours, and together with her husband was separated during that time from her young child, you can consider that in determining whether the arrest and imprisonment were a personal insult and indignity to her, which could necessarily, or probably, impair her bodily health and wound her feelings, producing mental anguish.

Should you conclude that the defendants, in beginning and conducting the criminal prosecution against the plaintiff, were swayed by actual malice, in contradistinction from legal malice, then, computing the damages, you may give what in law are called exemplary or punitive damages, or what is sometimes called "smart money." Such damages may be awarded to vindicate the law, to punish the defendants and to deter others from doing like wrongs, and hence these names for such additional damages. But you should not be decoyed by the terms that I have used, or by the principle of punishment in exemplary damages, into assessing excessive damages or into rendering an unjust verdict. The court would not tolerate an excessive verdict for damages awarded by way of punishment.

In estimating the exemplary damages, it is competent for you to consider the standing of the defendants. A man of high character and of known force and influence in the community may injure another by wrongfully prosecuting him in a criminal case more than a man of less character can do. There was evidence tending to show how much the

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defendants were worth, introduced. That evidence was admitted, and it is to be considered by you, for the purpose of showing the standing of the defendants in the community, "to enable you to determine how much the plaintiff has been injured." *Alpin v. Morton*, 21 O. S., 545-6. It is not to be used, however, for the purpose of determining their ability to respond in damages.

So you may also consider the character and standing of the plaintiff. If she had a well established character or reputation, there is less probability of the wrongful criminal prosecution injuring her than there would be if she had been a new woman just starting in the effort to build up a reputation.

I have already told you, and now reiterate it that you may consider in mitigation of the damages the fact—if it is a fact proved—that the defendants consulted and were advised by a reputable attorney that they had reasonable ground for prosecuting the plaintiff.

The plaintiff can not claim and recover damages for the publicity given to the alleged wrong done to her by the bringing of this suit, because it was brought of her own choice.

Unless you find from the entire evidence, and under the instructions of this charge, that the plaintiff is entitled to recover, you can not and must not award her damages out of mere sympathy. You have no right to award damages against the defendants merely because they may have sufficient means with which to pay any judgment entered on the verdict. You can only consider their pecuniary ability for the purpose already explained.

On the other hand, you should not withhold justice from the plaintiff because she occupies an humble position in life and is not shown to be wealthy.

You should decide this case precisely as you would or ought to do between two individuals who are strangers to you, and neither sympathy nor prejudice should be allowed to influence your verdict in the slightest degree.

Without fear, favor, sympathy, prejudice or passion you should render such a verdict on all the facts and circumstances of the case as you, in the exercise of a sound judgment, and guided by the law as contained in the charge, consider the case entitled to.

J. J. Chester and A. T. Seymour, for plaintiff.

Wood & DeWitt, for defendants.

Note.—In *Page v. Miller*, 3 O. Dec., 540, according to the second syllabus, the circuit court of the sixth circuit decided that the advice of counsel "is not a full defense, but only goes to the mitigation of damages," while the Supreme Court in *White v. Tucker*, 16 O. S., 468, (second syllabus), decided that the defendant may prove that fact as "tending to rebut malice and to mitigate damages." True, the advice there considered was that of a magistrate. Still, there is no difference in principle between such advice and the advice of an attorney.

MALPRACTICE.

[Knox Common Pleas. May 28, 1897.]

GEORGE K. TISH V. A. D. WELKER ET AL.

1. A person who holds himself out to the public as a physician surgeon is not required to possess the highest degree of knowledge and skill which the most learned and skillful in his profession may have acquired, but he is required to possess and exercise at least an average degree of knowledge and skill.
2. One who holds himself out and offers his services to the public as a surgeon impliedly contracts with every one who employs him that he has ordinary knowledge and skill in his profession and also that he will use reasonable and ordinary care and diligence in the exercise and application of his knowledge and skill.
3. It is the duty of a surgeon, when he takes charge of a case such as a broken femur bone, to give his patient all necessary and proper instructions as to what care and attention the patient should give his broken limb, in the absence of the surgeon, and the caution to be observed in the use of the limb before it is entirely healed.
4. And it is the duty of the patient to adopt and follow out all reasonable directions and requirements of the surgeon relating to the treatment or care of the injured limb.
5. By taking charge of a case a surgeon does not thereby guarantee to effect a cure, or restore the broken limb to its normal condition and usefulness. He is not, therefore, responsible for want of success, unless it is shown to result from a want of ordinary skill or ordinary care and diligence.
6. It is negligence in a surgeon to employ an unskillful assistant to dress and treat an injured limb. The surgeon and the assistant are jointly and individually responsible for unskillful or negligent services of the assistant.
7. Although no instructions are given by the surgeon to the patient, as to the care of an injured limb, such patient is required to use and exercise such ordinary prudence and care in the use and treatment of his injured limb as would be expected of one not having any special knowledge of what would be required of a person in his condition.
8. Photographic negatives, taken by the Roentgen or X-ray process, showing the shape and size of a broken bone at different times in its treatment, are competent evidence in an action for malpractice.

Gentlemen of the Jury: The plaintiff in this case, George K. Tish, files his petition against the defendants, Andrew D. Welker, Frank C. Larimore and Daniel S. Coleman, and says that on or about August 12, 1893, the plaintiff broke and fractured the femur bone of his right leg; that on said date the defendants, holding themselves out as surgeons, were employed by the plaintiff, as surgeons, to set said bone in its proper place, reduce said fracture and to attend plaintiff until he should become cured; that the defendants thereupon entered upon said employment, but were so negligent and unskillful in attempting to reduce said fracture and in attending and dressing said leg that said bone was not set in its proper place, nor said fracture properly reduced; and that by reason thereof plaintiff has become seriously and permanently maimed and crippled, and has suffered and will continue to suffer great pain as long as he lives; that he has been unable and will always be unable to travel or walk about without great difficulty and suffering; that his capacity for labor and following his occupation in life, has been and will continue to be seriously and greatly impaired.

That by reason of the premises he has been damaged in the sum of five thousand dollars, for which he asks you to return a verdict in his favor.

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To this petition the defendants have filed each his separate answer.

The defendant, Andrew D. Welker, says that he admits that on August 12, 1893, the bone of the plaintiff's right leg was broken, as alleged in his petition; and for his defense he denies that he held himself out as a surgeon; denies that he was ever employed by the plaintiff to reduce said fracture or set said broken bone. He says that at the time the plaintiff was injured he was a practicing physician and lived in the village of Gambier; that on said day he was called to see plaintiff soon after the plaintiff was injured, and after he had made an examination of plaintiff's injured leg he then and there notified the plaintiff that owing to this defendant's limited skill and experience in surgery and in the treatment of such serious injuries as that which the plaintiff had sustained he would not undertake to reduce said fracture or set said broken bone or treat the same, and that the plaintiff should employ an experienced and skillful surgeon to perform the services required; and that thereupon the plaintiff did employ the defendant, Frank C. Larimore, a learned, experienced and skillful surgeon, and the defendant, Daniel S. Coleman, to render such services as his case required.

This defendant further says that he never had charge or control of the case, and never was in any way responsible for the treatment thereof, the same being by said plaintiff wholly intrusted to other persons than this defendant; and he denies each and every other allegation of the plaintiff's petition, not expressly admitted by him to be true.

The defendant, Frank C. Larimore, says that he admits that on August 12, 1893, the plaintiff was injured as alleged in his petition; he admits that this defendant held himself out to be a surgeon, and was, on said day, employed by the plaintiff to reduce said fracture and set said broken bone, which work this defendant says he then and there did in a careful, proper and skillful manner; that this defendant with his own consent was by the plaintiff discharged from all further care or responsibility of treating said injured leg. He denies that he was in any way negligent or unskillful in his treatment or management of plaintiff's injured leg. And for a further defense, this defendant says that if plaintiff's said leg is now deformed or crippled or painful the same is wholly the result of said injury, and of plaintiff's own misconduct, negligence and disobedience of this defendant's instructions in regard thereto; and he denies each and every other allegation not expressly admitted by him to be true.

The defendant, Daniel S. Coleman, admits that on August 12, 1893, the plaintiff was injured as alleged; that he, this defendant, at that time was a surgeon; and for his defense, he denies that he was ever employed by the plaintiff to reduce said fracture or set said broken bone or that this defendant ever undertook to do the same or ever had anything whatever to do with plaintiff's injured limb, until the said fracture had been reduced and said broken bone set by the defendant, Frank C. Larimore; after which this defendant did, at the request and instance of the plaintiff, visit him, the said plaintiff, and look after, treat and dress said injured leg, all of which this defendant did in a careful, proper and skillful manner.

And for a further defense this defendant says that if plaintiff's said leg is now deformed or crippled or painful the same is wholly the result of said injury, and of plaintiff's own misconduct and disobedience of this defendant's instructions in regard thereto; and he denies each and every

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other allegation of the plaintiff's petition not expressly admitted by him to be true.

To the answer of the defendant, Frank C. Larimore, the plaintiff has filed his reply in which he denies that said Larimore carefully or skillfully reduced the fracture of said broken bone; denies that the defendant, Larimore, was discharged by the plaintiff from further care and treatment of said injured leg; and he denies each and every other allegation in said answer contained.

In reply to the answer of the defendant, Daniel S. Coleman, the plaintiff says that he denies each and every allegation set forth and contained therein.

These pleadings make the issues you are to decide, after carefully considering and weighing all the evidence introduced during the progress of this trial.

The burden of proof is on the plaintiff; and he must satisfy you, by a preponderance of the evidence, of the truth of all the material facts in issue necessary to entitle him to recover.

By "burden of proof" is meant the burden or duty of satisfying the minds of the jury of the truth of all the material facts alleged by the plaintiff and denied by the defendant.

By a preponderance of the evidence is meant that degree of evidence, produced in proof of facts, which, in the minds of the jury, outweighs all the evidence to the contrary. It is such evidence as inclines the minds of the jury to believe the facts that constitute the claim of the plaintiff, rather than the facts upon which the defendants rely for a defense.

This is a civil case and not a criminal case that you are now trying; and you should bear in mind the distinction between a preponderance of the evidence, which is all that is required to turn the scale in favor of the plaintiff in civil cases, and proof beyond a reasonable doubt, which the state must always produce before the jury can convict in criminal cases. You should remember that you are required to find by a preponderance only of the evidence, if you find for the plaintiff in this case, and not beyond a reasonable doubt.

And now, gentlemen, I will instruct you as to the respective duties and responsibilities of a surgeon and his patient. If a person holds himself out to the public as a physician surgeon the law requires him to possess and exercise ordinary skill and knowledge in his profession in every case of which he assumes the charge or undertakes to treat. He is not required to possess the highest degree of knowledge and skill which the most learned and skillful in his profession may have acquired, but he is bound to possess and exercise in his practice at least the average degree of knowledge and skill possessed and exercised by the members of his profession generally.

A surgeon who holds himself out and offers his services to the public as a surgeon, impliedly contracts with every one who employs him that he has ordinary knowledge and skill in his profession; and also that he will use reasonable and ordinary care and diligence in the exercise and application of his skill and knowledge, to accomplish the purpose for which he is employed; and if he does not possess an ordinary degree of knowledge and skill, or is negligent and careless in his treatment of his patient, and injury results to his patient by reason thereof, without any fault or negligence on the part of the patient, the surgeon would be liable

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in damages to his patient for the injury caused by his negligence or unskillfulness.

It is the duty of the surgeon, when he takes charge of a case such as a broken femur bone, to give his patient all necessary and proper instructions as to what care and attention the patient should give his broken limb, in the absence of the surgeon, and the caution to be observed in the use of the limb before it is entirely healed. And it is the duty of the patient, and he is bound to adopt and follow out all reasonable directions and requirements of the surgeon, relating to the treatment or care of the injured limb; and if he does not do so, and injurious consequences result from his failure to do so, he cannot recover damages from the surgeon for want of skillfulness or for negligence on the part of the surgeon.

By taking charge of a case a surgeon does not thereby guarantee to effect a cure, or restore the broken limb to its normal condition and usefulness. There is no warranty on the part of the surgeon to effect a cure unless made by a special contract. But there is an implied contract that the surgeon possesses that reasonable degree of skill ordinarily possessed by his profession; and that he will use reasonable and ordinary care and diligence; and he is not responsible for want of success, unless it is shown to result from want of ordinary skill or ordinary care and diligence.

The first question you are called upon to determine, gentlemen of the jury, is whether the defendant, Dr. Welker, about the time of the injury to the plaintiff, held himself out as a surgeon; whether he assumed the duty and responsibility of treating the plaintiff's injured limb; that is, whether he was employed by the plaintiff or the relation of employer and employee was created between them; whether he informed the plaintiff that he would not assume the responsibility of treating the plaintiff's limb, and that he, the plaintiff, must procure some other person more competent than he to undertake that service.

These are facts in issue between the plaintiff and the defendant, Dr. Welker; and the plaintiff must satisfy you, by a preponderance of the evidence, that Dr. Welker did assume the duty and responsibility of a surgeon in treating the plaintiff's broken limb, or his case as to Dr. Welker will fail. If the plaintiff has proved to you, by a preponderance of the evidence, that Dr. Welker did assume the duties and responsibilities of a surgeon in the treatment of plaintiff's injury, you will next consider the next question that arises in the case. If you do not so find, then the defendant, Dr. Welker, would not be liable to plaintiff in this case, and without considering the evidence any further as to Dr. Welker, your verdict would be for him, whatever you find as to the other defendants.

The question of employing the other defendants you are not called upon to decide from the evidence, for it is admitted by the defendant, Dr. Larimore, that he was employed by the plaintiff to treat the plaintiff's broken limb, by adjusting the pieces of the bone, or setting it, as it is commonly called; and it is admitted by the defendant, Dr. Coleman, that he was employed by the plaintiff to dress and take care of it after it had been set by Dr. Larimore. And these defendants further admit that they are and were surgeons at that time.

The next question in its order, for you to determine from the evidence, is whether the defendants or those of them you find were employed by the plaintiff and assumed the duties and responsibilities of surgeons, possessed and exercised a reasonable and ordinary degree of skill, as surgeons, in the treatment of the plaintiff's limb.

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If you find, by a preponderance of the evidence, that the defendants, or any of them, did not possess and exercise a reasonable and ordinary degree of surgical skill in the treatment of the plaintiff's broken limb, and damages resulted to the plaintiff by reason thereof, without any fault on the part of the plaintiff that contributed to his injury, the defendant or defendants failing to possess and exercise ordinary surgical skill would be liable to the plaintiff for the injury resulting therefrom; if you do not so find, they would not be liable on that account.

The next question for your consideration is whether the defendants, or any of them, were guilty of negligence in treating the plaintiff's limb. The law does not presume negligence. It must be established by proof; and the burden of proving negligence, by a preponderance of the evidence, is upon him who alleges it. In this case the burden of proving negligence in the defendants, or any of them, is upon the plaintiff. The fact that the plaintiff's limb is now in a crippled and deformed condition, if you find the fact to be so, does not raise the presumption that that condition was caused by the negligence of the defendants, or any of them; but the plaintiff must prove affirmatively, by a preponderance of the evidence, that there was negligence in the defendants, or one or more of them, in the treatment of plaintiff's limb, before they, or any of them, would be liable in damages to the plaintiff on that account.

In this connection you will consider the question made by answer of Dr. Larimore. He alleges that what he did for the plaintiff was done with skill and care; that he did set the plaintiff's broken bone, and was with his own consent discharged by the plaintiff from any further care or responsibility in the treatment of plaintiff's limb. If you find that this defendant was discharged by the plaintiff, as alleged by him in his answer, the court instructs you that he would not be liable to the plaintiff for the negligence or unskillfulness of any other person subsequently employed by the plaintiff to take charge of and treat his injury.

You will also consider in this connection whether Dr. Welker procured the services of Dr. Coleman on his own account, if you first find that Dr. Welker was employed by the plaintiff, or whether Dr. Coleman was employed by the plaintiff. This question you will understand is to be determined by you only in the event that you find there was negligence on the part of the defendant that produced the injury of which the plaintiff complains, without any fault or negligence on his part; otherwise, there would be no occasion for you to decide this question. If you find, by a preponderance of the evidence, that Dr. Welker employed Dr. Coleman to dress and treat the plaintiff's limb, on his own account, after taking charge of and assuming the duties and responsibilities of the case himself, and you further find by a preponderance of the evidence, that the present condition of the plaintiff's limb was caused by the unskillfulness or negligence of Dr. Coleman in dressing and treating it, without any fault or negligence on the part of the plaintiff that contributed to his injury, then Dr. Welker with Dr. Coleman would be responsible in damages to the plaintiff: for it would be negligence in Dr. Welker to employ an unskillful assistant, and the negligence of Dr. Coleman, the employee, would be the negligence of Dr. Welker, the employer, if you find there was such employment, otherwise Dr. Welker would not be liable for the injury resulting from unskillfulness or negligence of Dr. Coleman, if you find there was such unskillfulness or negligence.

The next question for you to decide and determine is whether the plaintiff was guilty of negligence that contributed to his injury of which the plaintiff complains, if you find for the plaintiff on the question of unskillfulness or negligence in the defendants, or any of them.

The burden of proving contributory negligence on the part of the plaintiff is on the defendants; and they must satisfy you, by a preponderance of the evidence, that the plaintiff was guilty of negligence that contributed to or caused the injury of which he complains, as alleged by them, unless the plaintiff's own testimony raises the presumption that he was guilty of negligence that contributed to or caused the injury of which he complains; in that event, the burden would be upon the plaintiff to remove that presumption by a preponderance of the evidence; and whether the plaintiff's testimony raises such a presumption is a question of fact to be determined by you from his testimony.

The plaintiff was bound to observe and follow whatever instructions were given to him by his attending surgeon, as to the care to be taken and use of his injured limb, if you find any such instructions were given, and if he negligently failed to follow the instructions given him, or purposely disregarded the same, and you find that such neglect or disobedience directly contributed to the injury of which the plaintiff complains, then he cannot recover in this action, although you find from the evidence that there was negligence or want of skill in the defendants, or any of them, that also contributed to his injuries.

If you find that no instructions were given to the plaintiff, yet the plaintiff would be required to use and exercise such ordinary prudence and care in the use and treatment of his injured limb as would be expected of one not having any special knowledge of what would be required of a person in his condition; and if he did not do so, but, on the contrary, was careless and reckless in the use of his injured limb, before it was sufficiently strong to be used, and that use contributed to produce the injury of which he complains, he cannot recover in this action, and your verdict should be for the defendants.

Ordinary care and prudence is the exercise of such care and prudence as ordinarily prudent persons would use, taking into account the extent of their knowledge and information of the matters involved, and all the exigencies of and circumstances surrounding the particular case.

It is a familiar principle in the law of evidence that the opinions of witnesses are in general incompetent; but an exception to this rule is that which allows the introduction of testimony by witnesses particularly skilled in a science or well informed in some particular matter, a thorough knowledge of which is not possessed by men in general: such, for example, as the science and art of surgery. This class of testimony is known as expert testimony. Witnesses have testified in this case, giving their opinions after having first shown that they possess knowledge of the science of surgery.

The opinion of witnesses is not desirable in any case where the jury can get along without it, and it is only admitted from necessity, and then only when it is likely to be of some value. But expert testimony, especially when it is conflicting, should be received by the jury with caution. I do not mean by that, that the testimony of expert witnesses is to receive no consideration. It is entitled to be considered by the jury in connection with their own knowledge of the subject of the inquiry and to receive such weight to which in their judgment it is entitled.

There have been offered in evidence two photographic negatives, taken by the Roentgen or X-ray process, of the plaintiff's injured femur bone. Scientists, by the aid of that wonderful and mysterious force we call electricity, have discovered a process by which they are enabled to procure a photograph, showing the shape and size of the living human body with a fair degree of accuracy. The negatives offered here in evidence in this case represent the shape and size of the plaintiff's right femur bone, somewhat enlarged, at the time the negatives were taken, namely, Exhibit A, on October 24, 1896, and Exhibit B, on May 9, 1896. They differ some in appearance, and that is accounted for by reason of the fact that they were taken with the bone in different positions with regard to the apparatus used in taking them, Exhibit A showing the bone from front to rear, and Exhibit B from a different point of view. You are to take these negatives and consider them as approximately correct representations of the shape and size of the plaintiff's injured femur bone, at the time they were taken, and at the present time, for the purpose of aiding you in determining the extent of the plaintiff's injury, or in any other way in the consideration of the evidence in this case.

If you find, gentlemen of the jury, by a preponderance of the evidence, that the defendants, or any of them, assumed the duties and responsibilities of treating the plaintiff's injured limb, and that they did not possess and exercise ordinary surgical skill, or were negligent in the treatment of said injury, and damages to the plaintiff resulted therefrom, without any fault or negligence on his part that contributed to the injury, your verdict should be for the plaintiff, and against such defendant or defendants; if you do not so find, your verdict should be for the defendants.

If you find for the plaintiff from the evidence and under these instructions, you will then determine the amount the plaintiff is entitled to recover; and in considering this question you will take into account the pain and suffering, if any, undergone by the plaintiff and arising from the injury caused by the unskillfulness or negligence, or both, of the defendants, or any of them, bearing in mind that you are to exclude from your consideration the pain and suffering caused by and necessarily following the accidental injury to the plaintiff; but only that, as I have said, arising from the unskillfulness or negligence, or both, in the treatment of the plaintiff's injured limb. You will also consider the permanency of the plaintiff's injury, if you find it is permanent, and the hindrance or inability it causes the plaintiff and will probably cause him in the future in following his usual occupation in life; the annoyance it has caused and will probably cause him, and all the other consequences necessarily flowing from the injury caused by such unskillfulness or negligence. And from a consideration of all the evidence you will return your verdict for such an amount as will in your judgment, fully and fairly compensate the plaintiff for the injuries he has thus sustained. The plaintiff can recover for such damages only as naturally flow from and are the immediate results of the wrongful acts complained of; and in determining the amount of damages you should be governed solely by the evidence introduced, and you have no right to indulge in conjectures and speculations not supported by the evidence.

You are the sole judges of the credibility of the witnesses, and the weight to be given to the evidence. You have a right to determine, from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor or frankness, their apparent intelligence, their in-

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terest in the event of the trial and from all the circumstances appearing on the trial, which witnesses are worthy of credit, and give weight to their testimony accordingly.

If you find for the plaintiff, and against all the defendants, your verdict will be against the defendants generally, without naming them; if you find for the plaintiff, and against any one or two of the defendants, you will designate by naming in your verdict the defendant or defendants against whom it is found, and also naming the defendant or defendants in whose favor you find; if you find for all the defendants, your verdict will simply be for the defendants, without naming them.

If you find for the plaintiff, and against any or all of the defendants, you will find the amount the plaintiff is entitled to recover and return your verdict for that amount.

Consider all the evidence in the case, give it such weight to which in your judgment it is entitled, and from a full and fair consideration of all the evidence decide the issues between the parties, and render your verdict accordingly.

On retiring to your room you will choose one of your number foreman, and after having agreed on a verdict reduce it to writing on the blanks that will be furnished you, and return it, sealed, into court.

The cause is now in your hands, gentlemen, and you may retire to your room for deliberation.

Verdict for defendants, generally.

Ewing & Ewing, Critchfield & Graham and S. M. Hunter, for plaintiff.

Cooper & Moore, J. B. Waight and W. L. McElroy, for defendants.

HOMICIDE.

[Richland Common Pleas, July 17, 1897.]

STATE OF OHIO V. PATE.

1. Malice may be shown by previous threats and conduct of the party, as well as the weapon used and the injury inflicted; and must include and be considered in connection with the surroundings, having reference to both parties.
2. An offender under the statute specifying who shall be deemed tramps, and providing a penalty for a tramp found carrying firearms or other dangerous weapons, may be arrested without warrant.
3. Any resistance to such arrest is unlawful and if the offender, in such resistance, shoots and kills the officer, he is guilty of manslaughter; and if the purpose to kill and malice entered therein it would be murder in the second degree; and if, in addition to both, premeditation and deliberation entered, it would be murder in the first degree.
4. The person making such arrest, however, should use only such force as is commensurate with his purpose, and if he uses more, he becomes a trespasser and would not be any more excused than if he pursued the prisoner for any unlawful purpose.
5. The purpose of the person making the arrest is a question for jury.
6. If the conduct of the person making the arrest is such as to put the offender under great fear of death or great bodily harm, reasonably to be apprehended, then he would be justified in resisting even to taking the life of such person.
7. Where a person is a trespasser on the ground of a railroad company, and is there for no lawful purpose, or as a loiterer, the railroad company, by its employees, has the right, first ordering him to leave, to employ such force as will reasonably eject him therefrom.

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8. If a person is rightfully upon such ground, no one has the right to drive him away, and in that event he could use such force as would maintain his rights, and, if necessary to maintain them, he would be justified in killing his adversary.

WOLFE, J.

Gentlemen of the Jury: The statute of Ohio defines and determines what acts constitute crime and prescribes the punishment therefor. So that, in order to determine whether any crime has been committed by the defendant, we may first profitably look to the statute of the state, which is here copied so far as it applies to this case:

First: "Whoever purposely and of deliberate and premeditated malice kills another is guilty of murder in the first degree."

Second: "Whoever purposely and maliciously, omitting the element of deliberation and premeditation, kills another is guilty of murder in the second degree."

Third: "Whoever unlawfully kills another, omitting the elements of premeditation and deliberation as appears in the first, and also omitting the elements of purpose and malice, as appears in the second, is guilty of manslaughter."

And again, it is provided by the statute that:

Fourth: "Whoever unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or wounds another, is guilty of assault and battery."

The indictment in this case is so framed and worded that all these crimes so enumerated as first, second, third and fourth, are embraced within its terms, and the jury in its deliberations may find from the evidence the defendant guilty of the first, or murder in the first degree; or, failing in that, they may find the defendant guilty of the second only, or murder in the second degree; or, failing in both these, they may find him guilty of the third only, or manslaughter; or, failing in the three above mentioned, they may find him guilty of assault and battery only; or, failing to find him guilty of any of these, the verdict should be "not guilty."

I am thus far only instructing you as to the statutory distinctions as to the different degrees of murder and assault and battery, as comprehended in the indictment.

Thus, assault and battery is charged in the indictment in the words found therein: "That the defendant did unlawfully assault and threaten said John Sellers in a menacing manner, and that he, the defendant, did unlawfully strike and wound said Sellers." And if the proof goes no further, the defendant, if guilty at all, would be guilty of assault and battery only. But if the proof shows more than this and establishes in your minds, as a direct and immediate consequence of such unlawful acts and wound, the said John Sellers died—not wounded only, but died from such wounds, then such killing and such death would constitute manslaughter. And if the evidence establishes still further that said act of unlawful shooting, wounding and killing was done purposely and maliciously, then such evidence would establish the elements of the indictment constituting murder in the second degree. Again, if added to all this you find that such killing, such death, was done with premeditation and deliberation, you have the highest crime known to the law, murder in the first degree.

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Coming now to the consideration of murder as charged in the indictment—it is averred in substance that on or about June 3, 1897, in the county of Richland and state of Ohio, the defendant, Hollis Pate, with a certain revolver, then and there in his right hand held, charged with powder and ball, did unlawfully, purposely and with premeditated and deliberate malice, shoot and kill said Sellers in manner and form as charged.

The defendant is entitled to the presumption of innocence, which presumption continues with him throughout the entire trial and until the state overcomes it by full proof and of a degree and character that admits of no reasonable doubt to the contrary. That is, that John Sellers is dead, that said death was caused directly by a ball from a loaded revolver in the hands of and fired by Hollis Pate, on or about the time mentioned in the indictment, and in the county of Richland and state of Ohio, as averred. And such death or such killing must have been unlawful to constitute manslaughter. And, moreover, it must have been unlawfully, purposely and maliciously done to constitute murder in the second degree. And still again, it must have been unlawful and done with premeditated and deliberate malice to constitute murder in the first degree.

The presumption of innocence must, as I have instructed you, be overcome, and each and every material averment of the indictment must be proved by the state beyond a reasonable doubt. What, then, is a reasonable doubt?

A verdict of guilty can never be returned without convincing evidence. The law is too humane to demand a conviction while a rational doubt remains in the minds of the jury. The jury will be justified and are required to consider a reasonable doubt as existing if the material facts, without which guilt cannot be established, may fairly be reconciled with innocence. In human affairs absolute certainty is not always attainable. From the nature of things, reasonable certainty is all that can be attained on many subjects. When a full and candid consideration of the evidence produces a conviction of guilt and satisfies the mind to a reasonable certainty, a mere captious or ingenious artificial doubt is of no avail. The jury must look to the evidence and, if that satisfies them of the defendant's guilt, they must say so; but if they are not fully satisfied and find only that there are strong probabilities of guilt, the only safe course is to acquit. And it is a further rule of law that each juror must be so satisfied by evidence beyond a reasonable doubt.

Malice and the design to kill are essential ingredients in the crime of murder in either the first or second degree. Neither malice nor an intent to kill necessarily enters into the crime of manslaughter, where the death results from an unlawful act designed to effect another object.

Malice is the dictate of a wicked, depraved and malignant heart. It is not necessary that the malignity should be confined or directed toward the person injured, but it is evidenced by any act that springs from a wicked and corrupt motive, attended by circumstances indicating a heart regardless of social duty and bent on mischief. Malice may be shown by previous threats, conduct of the party as well as the weapon used and the injury inflicted; and must include and be considered in connection with the surroundings, having reference to both parties to the transaction. In this case, to constitute crime of whatever degree, the evidence must be convincing beyond a reasonable doubt; you cannot convict on a preponderance of the evidence only.

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And thus the jury must find the offense was committed as charged in the indictment: That John Sellers is dead, and that his death was caused by wounds by the defendant inflicted unlawfully, before you can find him guilty of murder as charged therein; or that being wounded by the defendant unlawfully, death was caused by some other agency than such wound, before on that account you can find the defendant guilty of assault and battery as charged in the indictment. It must appear from the evidence and circumstances in evidence, beyond reasonable doubt, and to each of you that the death was directly caused by a bullet fired from a revolver in defendant's hands, and by him directed, not accidentally, but with the design to injure; and further to convict of murder in the first degree you must be satisfied:

First—That the defendant perpetrated the act purposely.

Second—That he did it with intent to kill.

Third—That he did it of deliberate and premeditated malice.

To constitute deliberate and premeditated malice, the intention to do the injury must have been deliberated upon and the design to do it formed before the act was done, though it is not required that either should have been present for any considerable time before.

This supposes a party by reflection understood what he was about to do, and intended to do it, to do harm. If these things are all proven and you find the defendant guilty of murder in the first degree, you need not examine further, but if not so proven to your satisfaction you should acquit him of murder in the first degree and examine further.

And if you find the death and the defendant's connection therewith as aforesaid, then, having acquitted him of murder in the first degree, to convict him of murder in the second degree you must find from the evidence:

First—That the defendant perpetrated the act purposely and maliciously.

Second—With intent to kill.

Third—Without premeditation and deliberation.

If you are not satisfied of the concurrence of these facts, you should acquit him of murder in the second degree, and you will be under the necessity of examining further.

And if you find the death and the defendant's connection therewith as aforesaid, before you can convict him of manslaughter you must also in addition find from the evidence:

First—That the act was done unlawfully.

Second—Without malice.

Third—With intent to kill, formed in the heat of a sudden quarrel.

Fourth—Without intent to kill while the prisoner was engaged in the commission of some unlawful act.

The preponderance of the evidence, alone, will not be sufficient to prove these elements or any averment of the indictment, but each and all must be proved as to each juror beyond a reasonable doubt, and while the burden of proof is always upon the state the jury must examine all the evidence in the case, to determine whether or not a crime has been committed and whether the defendant is guilty as charged in the indictment.

It is provided by statute that: "Whoever, except a female or blind person, not being in the county in which he usually lives or has his home, is found going about begging and asking subsistence by charity, shall be

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taken and deemed to be a tramp. * * * Any tramp who is found carrying a fire-arm or other dangerous weapon, or does or threatens to do any injury to the person or property of another shall be imprisoned in the penitentiary, etc., and any person may, upon view of any such offense, apprehend any such offender, and take him before a justice of the peace or other examining officer for examination."

If the jury find from the evidence that the prisoner at the time in question was an offender within the provisions of this statute, any person, officer or otherwise, upon view of the offense, acting in good faith, with such view and actual knowledge gained from his own senses, would have a right and it would be his duty without a warrant to arrest him, and take him before a magistrate for examination; and if that is the only assault Sellers made, then any resistance by the defendant would be unlawful and unjustifiable, and if by such resistance he shot and killed the officer as charged in the indictment he would be guilty of manslaughter, and if the element of purpose to kill and malice entered therein it would be murder in the second degree, and if in addition to both, premeditation and deliberation entered as further elements it would be murder in the first degree as charged in the indictment. It will, however, be remembered that any person so making such arrest should use only such force as is commensurate with his purpose. If he use more, the officer or person becomes a trespasser and the deceased would not be any more excused than if he pursued the prisoner for any unlawful purpose.

What the purpose is, is a question for the jury, and if the conduct of Sellers was such in the pursuit as to put the defendant under great fear of death or great bodily harm, reasonably to be by him apprehended, then he would be justified in resisting even to taking the life of Sellers and it would be a complete defense.

A man may, in his defense, employ sufficient force to repel the assailant. The law does not measure nicely the degree of force which may be employed by a person attacked, and if he use more force than is necessary he is not responsible for it, unless it is so disproportionate to his apparent danger as to show wantonness, revenge or malicious purpose to injure the assailant.

The jury have a right to take into consideration the defendant, his purpose there, the manner by which and the purpose for which the defendant had possession of the weapon, if he had one, and the purpose for which the officer had the weapon and for what purpose he approached the defendant.

If the defendant was then a trespasser on the ground of the railroad company, or if he was there for no lawful purpose, or was a loiterer, the railroad company by its employees had the right, first ordering him to leave, to employ such force as would reasonably effect his ejection therefrom, and if the employee or Sellers, if he was so employed, used more force than was reasonably necessary, he would become an aggressor and the right of self-defense would be in the defendant as before defined. If the defendant was rightfully upon the telegraph poles or within the switch where the tragedy occurred, no one had the right to drive him away, and the prisoner in such case could resist with such force as would maintain his rights, and if necessary to maintain them he would be justified in killing his adversary, and such exercise of right would be no offense.

The jury will examine all circumstances with a sincere effort to arrive at the truth, and if it shall appear to you that the defendant destroyed the

life of John Sellers by purposely and deliberately and premeditatedly shooting him as charged in the indictment with intent to kill, and death from said cause ensued, the crime is murder in the first degree. If he intended to kill, although he formed the designs coolly but a moment before the act, the law esteems it a premeditated killing.

If it shall be proven to you that the act charged was purposely and intentionally inflicted, thereby causing the death of Sellers, but without meditation or deliberation before the act, then his crime is murder in the second degree.

But if it shall appear from the evidence that the shot, if fired, was while the defendant was under undue excitement or passion, or was by him done while he was committing some unlawful act and without intending to kill, his crime would be manslaughter.

And from the last conditions, if death did not ensue, or resulted from other causes than the wounds of said bullet, then it would be assault and battery only. Otherwise the defendant is not guilty.

It is the peculiar province of a jury to judge as to the facts. It is the duty of the court to advise as to the law, and you will receive the same strictly as indicated by this written charge. When the facts are ascertained the law determines the grade and name of the offence and affixes the punishment, with which you have nothing to do. You pronounce upon the single question of guilt or innocence, with the grade of the crime as the case may be. Both you and the court are bound by the law, and we have no right to substitute our own opinions for what we think it ought to be as against what it is. The safety of the community depends upon this course.

If you find the prisoner guilty, you will state in your verdict whether it is murder in the first or second degree, or manslaughter, or assault and battery, as the case may be.

If you find him guilty of murder in the first degree, you will add to the form of your verdict the words "guilty of murder in the first degree, as charged in the indictment."

If the second degree, the words "guilty of murder in the second degree, only, as charged in the indictment."

If of manslaughter, you will add the words "guilty of manslaughter, only, as charged in the indictment."

If of assault and battery, you will employ the words "guilty of assault and battery, only, as charged in the indictment."

If not guilty, you will employ the words "not guilty."

You will retire to your room for deliberation, sign your verdict by your foreman appointed from your number, and return the same to court.

[The jury, after deliberating six and one-half hours, returned a verdict of guilty of manslaughter.]

LEGAL INSANITY.

[Franklin Common Pleas, December, 1894.]

STATE OF OHIO V. GEORGE KALB.

1. A person indicted for an offense is not sane, in the sense of that term as it is used in sec. 7240, Rev. Stat., when he has not sufficient knowledge, reason and mental capacity to understand that his act, charged to be criminal, was intrinsically wrong, or, having sufficient mental capacity to distinguish right from wrong, he has not sufficient will power to refrain from doing the wrong.
2. A person may be mentally insane, and yet not legally insane.

PUGH, J.

Gentlemen of the Jury: You were sworn to try the short, sharp and narrow issue, whether George Kalb, the defendant in a pending homicide case, was, on last Thursday, sane or not sane. The issue was made up in a proceeding authorized by the statute, at any time before sentence.

In this proceeding, as in most litigated cases, are involved two kinds of questions: Questions of law and questions of fact. It is the exclusive province and duty of the court to decide the former. It is yours to decide the latter, subject to the application of the law, as it shall be given to you by the court. It is also your duty to obey the instructions of the court, touching the matters of law. If the instructions of the court and the arguments of the attorneys do not accord on these questions, it is your duty to disregard their arguments and exclude from your minds all impressions lodged there by such arguments. It is competent for the court to aid you in deciding the questions of fact by summing up the salient evidence offered; that is, "by recalling to your recollection the testimony, by collating its details, by suggesting grounds of preference, where there is a contradiction, by eliminating the true points of inquiry by resolving the evidence into its simplest elements and by showing the bearing of its several parts and its combined effect, stripped of every consideration which might otherwise confuse or mislead you."

But let it be distinctly understood that what I may say about the questions of fact is not designed to fetter the exercise of your independent judgment in deciding them, nor is it intended to release you from the duty and responsibility of deciding them. The observations and suggestions which may be made upon these questions will be merely advisory, to aid you in the ascertainment of the truth.

The issue of insanity is a delicate and perplexing one, because it involves a definition of insanity and the detection of insanity from the conduct of an individual.

What is insanity? Generally it has been defined to be a disease of the mind; "a disease of the organ that thinks." But what is the mind? What is the organ that thinks? It is a "subtle essence," which is not cognizable to the sense of the outsider or observer. It cannot be subjected to analysis as long as it is living. It cannot be inspected by either lens or microscope, or measured by any instrument. The molecular changes which accompany thought, it is said, cease at death; and, while living, the physical functions of the brain can only be guessed at. It has been claimed that insanity is such a derangement of the mental faculties of the person whose sanity is in question that he is unable to reason correctly. But it differs so much in kind and degree that medical science

has never been able to formulate a definition precise enough to be useful in the varying circumstances of each individual case. Medical men whose labors and studies are in the line of mental disorders do not agree as to the definition of insanity, nor as to the existence of it in any particular case. Dr. Hammond, in his work on Diseases of the Nervous System, defines insanity to be "a manifestation of disease of the mind, characterized by general or partial derangement of one or more of the faculties of the mind, and in which, while consciousness is not abolished, mental freedom is perverted, weakened or destroyed."

One of the medical witnesses who testified said that this definition was scientifically accurate.

But all this is too abstract and general for practical purposes. The trouble, the defect, in all the definitions that have been framed by medical science is that they do not define. What we want is a working definition, a legal definition, a definition that will aid us in forming a correct judgment in this very proceeding. The law supplies that want.

The law's definition of insanity, however, does not harmonize with the conclusions of medical science.

I borrow from another judge observations which are apropos in these proceedings: "On both sides of an invisible line are multitudes of cases where it is impossible to say with confidence whether the mind is sane or insane. But when the question of responsibility is presented in a court there is an imperative necessity for deciding, and the further necessity of deciding it by rule. An arbitrary line, if one can be discovered, must be drawn. It must be drawn so as to be certain, comprehensible and broad; certain enough for the conduct of life; comprehensible enough to be clearly explained to a jury of twelve plain men; and broad enough to cover many cases without confusing unskilled minds by minute distinctions. The refinements of medical science must be pretermitted. The first necessity in the administration of justice must be considered, and that is the safety of the community, the protection of the greater and more valuable portion of the community who are not insane. A rule must be laid down which will not have the effect of letting criminals escape punishment through the bewilderment of juries. Tenderness to the weak, however commendable in itself, is not to be so stretched as to endanger the lives or even the property of the public." These are some of the reasons which inspired a legal definition of insanity, and made it a virtue of necessity and a dictate of wisdom, and I will now explain it to you.

The term "sane" used in the language of the statute under which this proceeding is being held is in its meaning the opposite, the contradiction, of the term "insane." The latter is the equivalent of the words "not sane." Both of these words have an established legal meaning in the state of Ohio. As used in criminal cases, the term "insane" signifies that when the accused has not "sufficient knowledge, reason, power and mental capacity to understand that his act," which is charged to be criminal in its character, was intrinsically wrong, he is not responsible. A sane person, therefore, is one who has sufficient knowledge, power and judgment to distinguish right from wrong; or, having such mental power, has sufficient will power to refrain from doing the wrong when the alternative is presented to him. This is the interpretation which must be given to the words "sane" and "not sane," used in the statute under which this inquiry is being held. This is the meaning which these words or their equivalents will bear to you whenever used in the context of this charge.

The question then is, had George Kalb, on last Thursday, sufficient judgment, intelligence, reason and mental power to perceive the difference between right and wrong? Or, having such judgment, reason, intelligence and mental power, had he sufficient will power to refrain from doing the wrong?

This is the test which you must apply to the facts proved, in deciding the issue which has been submitted to you. It is a question of the responsibility of George Kalb for his actions. It is not a question whether he was then medically insane; because he may have been medically insane, and yet have had a sufficient perception of the difference between right and wrong to make him responsible. A man may be medically insane, insane according to the conclusions of medical science, and yet be responsible for his actions, in law. Indeed, it is generally true that mental unsoundness does not necessarily bring with it irresponsibility for crime.

The suggestion was made during the trial, from evidence elicited, that in all insane asylums rules have been adopted for the government of their inmates. That is true; and they are restrained from violating these rules by a fear of punishment. But it is also true that there are hundreds of those inmates who, so far as you know, if they had been guilty of committing crimes, might, in law, be responsible for having committed them, because they had sufficient mental capacity to distinguish between right and wrong. They were not excluded, and could not be excluded, under the statutes of the different states, because they possessed that knowledge.

It is not a question here whether George Kalb had, on last Thursday, a weak mind or low grade of intelligence; for those conditions may be perfectly consistent with insanity in the legal sense. Weakness of mind is relative. It is not absolute. Weakness of mind, which falls short of that nature and degree that it abolishes mental freedom, or that renders the person whose sanity is in question incapable of distinguishing between right and wrong, would be wholly insufficient to justify a verdict of insanity.

"Nature," it has been said, "makes no leaps," and from the most powerful intellect to the idiot, "there is a continuous, unbroken and imperceptible descent." Every person whose intellect is inferior to the most powerful intellect has a weaker mind than those who belong to the grade next above him; but he is not, for that reason, irresponsible for his actions, for his crimes.

Nor is it a question in this proceeding whether George Kalb had peculiarities. One of the ablest writers upon insanity has declared, what accords with common observation and common experience, that there are many persons who, without being insane, exhibit peculiarities of conduct, thought and feeling. They come from families in which either insanity or other nervous diseases exist. They may, or they may not, become insane.

The knowledge of right and wrong test has been assailed by medical writers with vigor, with great vehemence and with intemperance by some; but it has successfully resisted all these assaults, and it is now the established test, the established law, all over this country, and especially in the state of Ohio. Taking into account everything that is pertinent to be considered, it is the wisest, the safest and the most easily applied test that has ever been devised by the human intellect. It is the rule of law by which you must be governed in deciding this case.

As to the proof of sanity: The condition of George Kalb's mind on last Thursday must be inferred from its outward manifestations, and they

are to be discovered from his language and conduct. By them his thoughts and emotions must be read. A large majority of mankind, as everybody knows, without any evidence to prove it, are sane. Even the extremists, who endeavor to impute insanity to the larger number of mankind, do not claim that over one out of every five is insane.

Have George Kalb's language and conduct, his thoughts and emotions, harmonized with, or harshly contradicted, the language and conduct, the thoughts and emotions, of a large majority of the people who are sane, as you know them? That is the process of reasoning by which you are to form a judgment as to whether he was then sane or insane.

This being the mode of considering the question, evidence of his conduct and language at different times and on different occasions was admissible and was admitted for your consideration. The more extended the view of his life, the safer must be the judgment formed of him. Everything relating to his physical or mental life was relevant, because a conclusion as to the insanity of any person must rest on a large number of facts. Evidence as to his mental condition at the time his wife was killed, and for two years back of the present time, was admissible, and was admitted because it may cast a perspective light upon his intellectual condition on last Thursday.

Another reason for the competency of this evidence exists in the fact that this disease of insanity is of slow growth and of indefinite continuance, and hence the longer the period through which its development is watched, the safer and the wiser and the more just must be the judgment formed upon that question.

Many of the witnesses who testified before you delivered opinions touching the sanity or insanity of George Kalb. The effect and weight to be given by you to those opinions must depend upon the relevancy, the stringency, the force and value of the reasons and facts upon which the witnesses based their opinions; and I affirm this to be true as well of the opinions delivered by the medical experts as of the opinions delivered by the non-professional witnesses. You are not obliged to follow and adopt, or absorb and make your own, any of the opinions so delivered. They are part of the evidence which you must consider, but you are not bound to reach the same conclusions the witnesses did.

Our Supreme Court, whose decisions on questions of law must be adopted by all of us, has declared that it would be a farce for a jury to decide a question of insanity upon the mere "strength of medical opinions," especially when the strength depends upon the larger number of medical opinions or witnesses; that such evidence should be given with care and caution, and should be received with caution by a jury; and "that in nine cases out of ten it would be utterly unsafe for either court or jury to follow or adopt the conclusions of the medical experts on either side." The opinion of a physician who is conversant with the disease of insanity and who has had liberal opportunities, by his own observation, to become acquainted with the personal habits, conduct and language and the appearance of the person whose sanity is in question, and who does not deliver his opinion for the purpose of shoring-up some preconceived notion or pride of opinion, is of undoubted value. The opinions of such witnesses may aid a court or jury in regard to the extent and influence of facts which lie out of the observation and experience of people in general. But the opinion of a physician who has not studied the progress of the disease in the patient, and who has had lim-

ited opportunities for observing the personal habits, conduct and experience of the person whose sanity is in question, is of very little if of any value. It would be unwise to place any reliance upon the evidence of facts gathered from a short interview, or even from a couple of short interviews. For the same reason it would be unsafe for you to decide the issue upon your own observations, made during this trial, because the time is too short.

The evidence shows that insanity may be shammed, and that the type or phase of insanity which can be feigned with the most facility is that of melancholia.

Evidence in relation to the killing of Kalb's wife was admitted, and for an obvious reason. Courts have frequently observed and declared that the claim of insanity has been abused in criminal cases. It is a claim or a defense that is all right when it is satisfactorily proved; but it has been abused, and especially when the evidence against the accused rendered any other defense hopeless. This evidence about the homicide was therefore admissible for the purpose of showing whether the evidence against Kalb rendered any other defense hopeless, and to show whether he had a motive for shamming insanity.

I am also justified by the evidence in saying that a careful observation, made by competent medical men, extending over a considerable period of time, with a view of marking the progress which the disease, if unfeigned, would make in one direction or the other, either to the total dissolution of Kalb's mind or to a state of improvement, would be successful in detecting any artifice or trick that may have been resorted to, or in establishing the real fact of a disease of insanity. Is there any surer way of detecting a stimulated case of insanity from a veritable case of insanity? But the evidence here fails, utterly fails, to show that any of the doctors who testified, except one, made that sort of an observation.

Evidence tending to show insanity in one of the ancestors and a brother and an uncle of George Kalb was admitted as pertinent; but it was not allowable for you to infer that he was insane on last Thursday from this testimony alone.

If the other testimony that has been offered tends to show insane conduct on his part, at that time, then this evidence tending to prove an inherited tendency to insanity would be corroborative of that evidence, and it can be used for that purpose, and for no other purpose.

After all, in the last analysis of the evidence, you must exercise your own good sense, intelligence and judgment in determining whether George Kalb was sane or insane. You must form your own opinions from all the evidence, taking into consideration and giving due weight to the opinions which have been put in testimony.

A sister and a brother of George Kalb testified. Both of them gave explicit opinions that George Kalb was insane. In weighing their evidence you must take into account what opportunities they have had for observing the recent conduct, appearance and habits of George Kalb. The sister only came here last Monday week, and you may take into account the limited opportunity which she has had to discover his recent conduct and habits, and determine whether her opinion, so far as it is founded upon recent observation, is of any value in determining the question submitted to you. In weighing the testimony of both of these witnesses, it is your duty to take into consideration their relationship to George Kalb and their probable interest in the result of your verdict. The highest interest which

any man or woman can have in this life, short of the great hereafter, is that interest which they have in their own lives; and the next highest interest which they can have is in that of the life of some dear relative, such as a husband or wife, father or mother, son or daughter, brother or sister. Persons thus related and thus interested have been known, when giving testimony in controversies, to color, to pervert and withhold facts, and to even testify falsely. It is for you to determine whether these witnesses, or either of them, have in giving their testimony been biased, influenced or controlled by their relationship to George Kalb, or their interest in the result of this proceeding. One of the doctors who testified for the defendant—Dr. Wilson—said that he was unable to say whether the mental disorder of George Kalb affected his judgment, or rendered him unable to distinguish right from wrong.

Another doctor who testified for the defendant—Dr. Rowles—said that in his opinion George Kalb was, in a measure, able to distinguish right from wrong. Taking that testimony alone, it would not authorize you to return a verdict of insanity.

Another doctor—Dr. Dick—who testified for the state, said that he was unable to say whether George Kalb was sane or insane. All the other doctors who testified for the defendant delivered opinions, more or less explicit, that Kalb was insane. The inquiry was not propounded to them as to whether they thought he had sufficient mental perception to distinguish the difference between right and wrong, but a reasonable inference is that their testimony means that, that is, that in their opinion he did not have that mental ability; and that is the construction which, in fairness to George Kalb, I place upon their testimony. In weighing the testimony of all these doctors it is your duty to take into consideration the very limited opportunities which they have had for observing the progress of the disease, studying and observing the conduct, appearance and habits of Kalb.

As to the burden of proof: The law presumes every person to be sane until the contrary be proved. The law presumes that George Kalb was, on last Thursday, sane, until the contrary be proved; and that contrary condition must have been established by a preponderance of the evidence. It was incumbent upon him, or rather upon his attorneys, to establish to your satisfaction his insanity, at that time, by a preponderance of the evidence. That is to say, that he did not then have sufficient knowledge, judgment and intelligence to discern the difference between right and wrong; or, having that ability, that he had not sufficient will power to refrain from doing the wrong, if the alternative had been presented to him.

If the evidence offered in this proceeding is evenly balanced upon that subject, you must return a verdict that he was then sane. If the inference of sanity can be just as easily and as reasonably drawn from the evidence as the inference of insanity, it is your plain duty to give the preference to the inference of sanity. If the evidence which has been offered leaves you in doubt upon that question, it is also your manifest duty to return a like verdict that he was sane. Nothing short of a preponderance of the evidence can or should justify you in returning a verdict that he was insane.

It is true, gentlemen of the jury, that it would be a grave thing, probably a grave wrong, to put this defendant to his trial for homicide when he was incapable of instructing his counsel or preparing his defense for the trial, and of testifying in his own behalf. But, on the other hand, you

should carefully guard against giving him an opportunity for shamming insanity; and in this way, or by yourselves drawing false deductions and inferences from the testimony, to pervert the course of justice for even one hour. The legislature never intended, in the enactment of the statute under which you were impaneled, to allow a jury, in a proceeding like this, to "subduct" a prisoner who was able to distinguish right from wrong, away from the jury and the verdict in the main case. There would be less injury done by the commission of an error on your part against the defendant than there would be by an error committed against the state, in deciding this issue; because, as the main case will probably not be tried for several weeks, the disease, if unfeigned, will surely, in that time, develop to its worst stage; and because, even after conviction, this inquiry may be repeated if, in the opinion of his counsel, it should become necessary.

It only requires nine of your number to concur in the verdict that may be returned. If nine of you agree in either conclusion, that becomes the verdict of the whole jury, and should be returned accordingly.

C. C. Williams, prosecuting attorney, and C. D. Saviers, assisting prosecuting attorney, for the state.

T. E. Powell and Ivor Hughes, for defendant .

SUPREME COURT DECISIONS

NOT FOUND IN THE REGULAR REPORTS.

The following decisions by the last Supreme Court Commission, the syllabi of which were published at the time, are not found in volumes 40 and 41, Ohio State Reports, which are understood to contain all the decisions of the Commission, nor anywhere else in the Supreme Court Reports.

FORECLOSURE—ISSUES ON APPEAL.

[May 29, 1883.]

RIDDLE ET AL. V. HOWENSTRIN ET AL.

ERROR to the District Court of Logan county.

MARTIN, J.

1. An action to foreclose a mortgage given to secure a note may be commenced at any time within twenty-one years after its execution, notwithstanding the note is barred by the statute of limitations.

2. It is discretionary with the district court, on appeal, to restrict the parties to the issues made up and tried in the court below; and in doing so there is no error unless it clearly appears from the record that there was an abuse of the discretion.

Judgment affirmed.

SALES—TENDER—VERDICT.

[September 25, 1883.]

TULLOS V. RODGERS.

ERROR to the District Court of Washington county.

MCCAULEY, J.

1. Where a party contracts to deliver personal property at a given time and place and is ready and willing to comply with the terms of his contract at the contract time and place agreed upon, and so notifies the other party to the contract, who then and there declares that the property, if tendered, would not be accepted by reason of an alleged defect therein, such party may maintain an action for breach of the contract

Supreme Court Decisions.

without actual tender of the property as required by the terms of the contract.

2. Where issues as to three facts are submitted to a jury and the verdict is for the defendant as to two of them and is silent as to the third, the verdict should be set aside unless the defendant enters a consent that the court may find as to said third fact for the plaintiff and render the judgment called for by the three facts as so determined.

No judgment will be entered in this case until October 16.

PERJURY.

[October 2, 1883.]

STATE OF OHIO V. CLARK.

ERROR to the Court of Common Pleas of Cuyahoga county.

MARTIN, J.

Upon an indictment of the husband for perjury the wife, after a divorce, is a competent witness for the state to prove material facts which occurred during the existence of the marriage, but were independent of and outside the coverture, and a knowledge of which was not acquired by her in conjugal confidence nor by reason of the marital relation.

PARTNERSHIPS.

[November 8, 1883.]

DYSART V. CLEVELAND IRON CO.

ERROR to the District Court of Columbiana county.

MCCAULEY, J.

R., the owner of a coal mine, sold one-half of the mine in common to the C. Iron Co., and agreed to operate the same jointly with the company, and that all property, tools and appliances owned by either party and used in operating the mine should remain the property of the party furnishing the same; and that the company should have all the coal necessary to supply its works at another place for a consideration paid to R., and that after the works of the company were supplied all the surplus coal should be sold by and in the name of the company, and the proceeds divided between R. and the company. And by the agreement between R. and the company it was further provided that the railroad track used in operating the mine should be kept in repair from the receipts for coal sold after the company had received its supply: *Held*,

1. That this contract, not providing expressly for a partnership, does not create that relation between R. and the company as to all their dealing under it.

2. That the company is not liable to D. for iron purchased by R. on the credit of R. & D. for the repair of the railroad track in the mine, when it does not appear that there was any money in the fund provided

Dysart v. Cleveland Iron Co.

by the contract for making such repairs; and that the purchase was made against the objection of the company; all of which was known to R. & D. before the purchase.

Judgment affirmed.

EXCEPTIONS TO MASTER'S REPORT.

[February 26, 1884.]

HOFFMIRE V. CUNARD.

ERROR to the District Court of Morrow county.

BY THE COURT:

A case was referred by the court of common pleas to a special master commissioner to take testimony, hear the cause and "report the testimony thereon with his conclusions of law and fact thereon." The master made a formal report of the conclusions of law and fact, and in said report stated "the evidence is all in writing and returned herewith." Exceptions to the report were filed and overruled, and judgment rendered in accordance with the findings. The exceptions concluded with a prayer that the report be set aside, but no formal motion for a new trial was made, and no bill of exceptions taken: *Heid*, the exceptions and prayer were in effect a motion for a new trial, but the testimony formed no part of the record. As no bill of exceptions presenting all the testimony was taken, this court cannot consider an objection, that the findings of the master were not supported by the evidence. It so happens in this case that if we consider such an objection the judgment below would be—as it is.

Affirmed.

PLEADING—EVIDENCE—TITLES.

[March 11, 1884.]

JACKSON V. ANDREWS & HITCHCOCK ET AL.

ERROR to the District Court of Mahoning county.

BY THE COURT.

It would have been sufficient for the plaintiff to have alleged in his petition that he was the owner of one-third of the coal in the described premises, without setting out the chain of title by which he acquired the ownership. The answer containing a denial that the plaintiff was such owner and averring ownership in the defendant, was good, and the court did not err in admitting at the trial as evidence certain conveyances tending to sustain the averments of the answer. After an examination of the various instruments by which the coal in the land was transferred, we are of the opinion that the plaintiff had no title thereto at the time the occurrences complained of took place.

Judgment affirmed.

NOTICE—CONTRACTS.

[April 15, 1884.]

ALICE PENISTON V. UNION CENTRAL LIFE INSURANCE CO.
ERROR to the District Court of Hamilton county.

GRANGER, C. J.

1. The rule that notice to an agent is notice to the principal, may be abrogated as between parties to a contract by stipulation to that effect.

2. A stipulation in a contract made by parties uninfluenced by misrepresentation or fraud, and with full knowledge that one party shall be absolutely released in case a statement made by the other shall be found to be not in all respects true, is valid, and must be enforced, where it does not affirmatively appear that the party making said statement, with reason, believed it to be true.

Judgment affirmed.

MORTGAGES.

[December, 17, 1884.]

BANK V. SINGER.

ERROR to the District Court of Harrison county.

MARTIN, J.

1. A mortgage of land made by a husband to his wife without the intervention of a trustee to secure his just debt to her is, as a grant, void at law and in equity; but is enforceable as an equitable lien simply.

2. Where such mortgage is duly recorded, and the wife, subsequently and after condition broken, unites with her husband in a mortgage of the same land to his creditor, joining in the granting clause and in a warranty against the lawful claims of all persons, and releases dower in the testatum clause: *Held*, her equitable lien is not thereby released or postponed.

3. Except as between the mortgagor and mortgagee, a valid mortgage is in this state considered as a mere security.

Judgment affirmed.

GRANGER, C. J., and NASH, J., dissent.

Powell Tool Co. v. Donald.

NEGLIGENCE.

[December, 17, 1884.]

B. & O. R. R. Co. v. URICH'S ADMINISTRATOR.

ERROR to the District court of Richland county.

NASH, J.

When a railroad company unnecessarily leaves in its yard a locomotive-engine, with a valve attached, which opens automatically whenever steam to the amount of one hundred and twenty pounds is raised, and so near the crossing of a public highway as to frighten horses upon such highway, it is guilty of negligence.

Judgment affirmed.

DICKMAN and MCCAULEY, JJ., dissent to the judgment.

TAXATION TO PAY FEES.

[December 17, 1884.]

WOOD COUNTY (COM'RS) v. STATE OF OHIO EX REL. HOLTZ.

ERROR to the District Court of Wood county

GRANGER, C. J.

1. The act entitled "an act to authorize the commissioners of the the counties of Putnam, Wood and Henry to levy a tax to pay for certain fees therein named," passed March 19, A. D. 1879, (76 O. L., 218), does not conflict with the constitution of the state.

2. A claimant entitled to a payment under said act, whose account, made out, attested, approved and certified, was duly presented to the county commissioners, and payment refused, is entitled, upon proper application, to a writ of mandamus to enforce payment.

3. The commissioners of the county should pay one-third of such claim, although prior to the demand they had, by paying more than one-third of other claims, disbursed more than "one-third part of all the fees and costs provided for" in said act.

The judgment of the district court of Henry county is reversed and a peremptory writ awarded; the judgment of the district court of Wood county is affirmed.

DIRECTING A VERDICT—AGENCY.

[January 13, 1885.]

POWELL TOOL CO. v. DONALD.

ERROR to the District Court of Cuyahoga county.

MARTIN, J.

1. After the plaintiff has introduced to the jury his testimony and rested, it is error in the court to direct a verdict for the defendant, if the testimony as to each essential fact tends to show a right of recovery.

Supreme Court Decisions.

2. Where an agent of an incorporated manufacturing company makes a contract for services and property for the use of the company, which is performed by the other party and which the company refuses to perform on its part, the mere fact that the agent was not authorized to stipulate for payment in the mode specified in the contract is no defense in an action against the company for damages.

Judgment affirmed.

CONTEST OF WILL—WITNESSES ADMISSIBLE.

[Ohio Supreme Court Commission, January 22, 1884.]

TREMBLEY V. TREMBLEY.

1. In an action to contest the validity of a will, after the defendant had offered the will and a certified copy of the order of probate in evidence, and the plaintiff had called one of the witnesses on whose testimony the will had been admitted to probate, who testified that he did not sign the will as a witness in the presence of the testator, the defendant may then call other witnesses to the will, not called in the probate thereof, and prove by them that they signed it, as witnesses, in the presence of the testator, and thereby prove the due execution of the will.
2. Where the name of the testator was not signed by himself but by another person by his direction, the person so signing may be a witness to the execution of the will.
3. Where another person signed the name of the testator to the will by his direction and in his presence, such signing is equivalent to a formal acknowledgment of the signature.
4. Where one of the witnesses to the execution of the will was the person who signed it for the testator, by his direction and in his presence, and the other witness heard the testator acknowledge the signature and the will to be his, and signed it as a witness, in the presence of the testator, the execution of the will was sufficiently proved.

ERROR to the District Court of Huron county.

The original action was brought in the common pleas by the plaintiff in error to set aside the will of his father, William Trembley, on the grounds that the testator did not sign the will, and that it was not signed in his presence by his direction, and that he was not of sound and disposing mind and memory, and that the making of the will was procured by undue influence.

There were three witnesses to the will, L. D. Allen, Dora C. Stringham and D. M. Keith. The will had been admitted to probate upon the testimony of Allen and Keith only. On the trial in the common pleas the defendant gave in evidence the original will, with a certificate of the order of probate, and rested. The plaintiff then called one of the witnesses to the probate, D. M. Keith, who testified that he did not sign the will as a witness in the presence of the testator, but that he signed it at a place two miles distant from the place where it was signed by the testator, or for the testator, and two days after it had been made and signed by the testator and the other witnesses to it, and the plaintiff then rested his case.

The defendants then called L. D. Allen, who testified that he wrote the will when he and the testator were alone; that by the direction of the testator he signed the will for him in his presence, and then signed it himself as a witness.

Trembley v. Trembley.

The defendants then called Dora C. Stringham, who testified that she came into the room where the testator was sitting up in bed. The testator said to her: "I want you as a witness to my will;" that L. D. Allen then came to the foot of the bed, holding the will in his hand, and asked the testator the question: "Do you want this person to know that this is your last will and testament?" to which the testator answered: "Yes, that is my last will. I want you to sign it as a witness," and that she thereupon signed as a witness in the presence of the testator and of Mr. Allen, and that it had already been signed by the testator, or by some one for him, and by Mr. Allen as a witness.

The witness, Allen, further testified: "When Dora Stringham came in the old man said: 'Dora, that is my will. I want you to sign it as a witness;' and I think, but will not be certain, that he said: 'I told Dow Allen to sign it for me.' She signed it there in the old gentleman's presence and mine."

The plaintiff objected to the testimony of Allen and Mrs. Stringham for the reason that it was not rebutting, which objection was overruled by the court and the testimony admitted. And no other or further evidence was offered by either party touching the signing or attestation of the will. The plaintiff thereupon asked the court to instruct the jury:

"That if the jury find from the evidence that in the absence of all other persons, the will was so signed for and with the name of the said William Trembley by said L. D. Allen, and that said Allen then signed his own name to said will as one of the subscribing witnesses thereto, they must reject the attestation and signature of said Allen as void," which request the court refused to give, but did thereupon instruct the jury:

"If you find from the testimony that Allen drew the will at the dictation of William Trembley, and at the time he so drew the will signed the name of William Trembley at his (Trembley's) request, and then and there in the presence of William Trembley, and at his request, signed the will as a witness, then in that case the name of William Trembley, so signed by Allen to the will, was William Trembley's act. And so far as the signature is concerned is the same as if William Trembley had signed it with his own hand, and the signature of Allen as a witness under such state of facts would be sufficient to make him a lawful witness to the instrument.

"When a will has been signed for the testator by another person in his presence and by his express direction, but in the absence of an attesting witness, the testator must acknowledge such fact and signature in the hearing of such attesting witness at the time of such attestation to make the same a valid attestation, and if this is not done then the will is not a valid will.

"But this acknowledgment is not required to be made in any particular words or in any particular manner. If by signs, motion, conduct or attending circumstances the attesting witness was given to understand by the testator that he acknowledged the signature thereto as his, and the instrument itself as his will, it is sufficient."

To which instructions the plaintiff excepted. The jury having returned a verdict for the defendants, judgment was rendered thereon, which judgment was affirmed by the district court.

As to the signature, *Greenough v. Greenough*, 11 Pa. St., 489; *Grabill v. Barr*, 5 Pa. St., 441; *Jackson v. Vandusen*, 5 John., 144; 3 Cur-

tis Ec. R., 752; 4 Dana, 1; Waller v. Waller, 1 Gratt., 454. As to acknowledgment, Haynes v. Haynes, 33 Ohio St., 614; 1 Best on Ev., secs. 60-61; 55 Ind., 402; 2 Greenleaf Ev. sec. 691; 1 Jamison on Wills (5 Am. Ed.), sec. 31; 1 Williams on Ex'rs, 60; 5 Watts, 399; 10 Watts, 153; 8 W. & S., 25; 36 Ind., 129. As to attorney attestation, 1 B. Mon. (Ky.), 114.

G. T. Stewart, Young & Young, for plaintiff, in error.

MCCAULEY, J.

The first question made on trial in the common pleas and still insisted on by plaintiff in error is the objection to the testimony of the witnesses, Allen and Stringham, called by the defendants to prove the signing and attestation of the will after the defendants had made their *prima facie* case, and the plaintiff had offered the testimony of Keith, one of the witnesses on whose testimony the will was admitted to probate, to prove that he did not sign as a witness in the presence of the testator.

The testimony of these witnesses was competent at the time it was offered and for the purpose for which it was offered. After it had been shown that Keith, one of the witnesses on whose testimony the will was admitted to probate, was not a competent witness, it remained for the defendants to prove that there still were two competent witnesses to the signing by the testator. "A proceeding to contest the validity of a will is in the nature of an appeal from the order of probate thereof, and all the material facts in issue are to be heard and determined *de novo* as though such order of probate had not been made." Haynes v. Haynes, 33 Ohio St., 598.

There were three witnesses to this will: Allen, Keith and Stringham. It was admitted to probate on the testimony of Allen and Keith only. On the trial, after the contestants proved by Keith that he had not signed as a witness in the presence of the testator, the *prima facie* case of the contestees was overcome. The burden was then cast upon them to prove that the will had been signed in the presence of two competent witnesses. If it was shown that it was thus signed, that was sufficient. After the *prima facie* case was made, the question as to the due attestation of the will was for the first time presented. If the plaintiff could give evidence to impeach it the defendants on their part should be permitted to give evidence to support it.

It is urged, in argument, that Allen, who wrote the will and signed it for the testator, could not himself be a witness to it. If Allen signed the name of the testator in his presence, and by his express direction, this signing was the act of the testator, so far as it had any legal significance. If any person other than Allen had signed for the testator in the presence of Allen and the testator, and by the direction of the testator, and the signature and the will had been properly acknowledged, it would be conceded that he might have signed as a witness. If he could be a witness in a case where another signed for the testator, there is no reason why he might not be a witness in a case where he himself signed for him. The signing here was not in the absence of Allen, but was done by him in the presence of the testator and by his direction. When the testator directed, procured and saw the signing, it was equivalent to an acknowledgment of it in a case in which it was not done in the presence of the witness. Allen was, therefore, a competent witness to the signing of the will.

Trembley v. Trembley.

Was Dora C. Stringham a competent witness? The instruction to the jury as to her competency was that, if the will was not signed in her presence by the testator, but was signed for him by another person by his express direction, in the absence of the witness, he must acknowledge the fact that it was so signed, must acknowledge the signature as his and the instrument as his will. But that the acknowledgment need not be made in any particular words or in any particular manner. If enough was said and done at the time to give the witness to understand that the testator made the necessary acknowledgment it was sufficient. This instruction was correct; and while the testimony as to what was said and done in the presence and hearing of Mrs. Stringham does not show that the testator formally made all the acknowledgments necessary to authorize her to sign the will as a witness, it cannot be said that such acknowledgments were not in fact made. The jury found that they were made, upon the testimony of Mrs. Stringham, that the will had been signed for the testator and by Allen, as a witness, before she signed it; and that, after this, Allen held up the will before the testator, who was sitting up in bed, and asked him if this was his will, when he said it was and asked her to sign it as a witness. And the testimony of Allen, who testified to the same facts, and further said that he thought, but was not certain, that the testator said: "I told Dow Allen to sign it for me." The verdict, therefore, was not so clearly without evidence to support it as to require that the judgment should be reversed for the refusal of the court below to set it aside and grant a new trial.

Judgment affirmed.

TORT—LIBEL.

For this case, decided by the Supreme Court, no opinion was ever published, the syllabus having been published in the regular court proceedings, as follows.

[Supreme Court, January Term, 1880.]

WILLIAM LAMPRECHT v. BENJAMIN B. CRANE.

ERROR reserved to the District Court of Morrow county.

McILVAINE, J. Held:

1. Where a petition states a good cause of action in tort, it is immaterial whether the remedy at common law would have, in form, an action on the case or in trespass.

2. In an action for a tort, wherein punitive damages were recoverable, the judgment will not be reversed on the ground that evidence showing the pecuniary condition of the defendant was admitted.

3. The final judgment in an action for libel on the publication of an affidavit for such a search warrant, is not a bar to an action for trespass in executing the warrant, where such warrant was void for want of jurisdiction in the court that issued it.

4. Where an action for libel on the publication of an affidavit for a search warrant has been defeated on the ground that the publication was privileged, the record of such is not admissible in evidence, even on the question of damages, in a subsequent action between the same

Supreme Court Decisions.

parties for a malicious prosecution, or for trespass in executing the search warrant.

5. In an action for libel founded on a writing published in the course of justice, the defense of privileged communication is not overcome by showing that the court in which the matter was published had no jurisdiction in the particular case then pending, by reason of the limitation of time, if such court had a general jurisdiction of the subject of the proceeding.

6. And for prosecuting such proceeding in such court, maliciously and without probable cause, an action for malicious prosecution will lie.

7. Where a prosecution is sought to be justified on the ground of advice of counsel, it is incumbent on the prosecutor to show that all the facts material to the prosecution known to him, or which might have been ascertained by reasonable diligence, were communicated to counsel. Judgment affirmed.

FRATERNAL INSURANCE.

[Supreme Court of Ohio.]

†FRATERNAL MYSTIC CIRCLE V. STATE OF OHIO EX REL. FRITTER.

A member of a private corporation organized for the mutual protection and relief of its members, though unlawfully expelled and excluded from participation in its benefits, is not entitled to a writ of mandamus to compel it to restore him to membership, because:

1. Such restoration is not an act specially enjoined by law.
2. He has a plain and adequate remedy in the ordinary course of the law.

ERROR to the Circuit Court of Franklin county.

The relator commenced an original action in the circuit court for a peremptory writ of mandamus, to compel the Fraternal Mystic Circle to restore him to membership with all its privileges and benefits.

A demurrer to his original petition having been sustained, he filed an amended petition, alleging, in substance, that the Fraternal Mystic Circle is a corporation organized under the laws of this state, for the purpose of the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families of its deceased members. In the corporation is a small body known as the Supreme Ruling, which claims to be vested with and exercises the supreme power of the corporation for the management of its business. The Supreme Ruling holds but one session a year, and in the interim of its sessions an executive committee of five persons claims to be vested with all the powers of that body, except legislative powers and the power to fix salaries of supreme officers. The constitution and by-laws of the corporation provide no mode or right of appeal from a decision of the Supreme Ruling, or of the executive committee.

The relator having all qualifications, became a member of the corporation and of the Supreme Ruling, and a contributor to its benefit fund, December 10, 1884. On January 9, 1885, he received from the corporation a certificate of membership and insurance, stipulating for the pay-

†The omission of this case from the reports was ordered by the court, and its authority may be questioned.

Fraternal Mystic Circle v. State.

ment to named beneficiaries of \$3,000.00, upon satisfactory evidence of the relator's death; or the payment of a sum not exceeding \$1,500.00, in accordance with rules governing the benefit fund, on satisfactory evidence of his total disability, and further, that it would pay to the beneficiaries seventy-five per cent. of all benefit assessments paid by him if he should die after being a member five years or more, it being, however, a condition to the obligation of the corporation that the relator be a member in good standing at the time of his death or disability.

The relator performed all his duties as a member, and until February 8, 1892, he enjoyed all the rights and privileges of membership. At that time, against his protest and objection, he was denied the privilege of voting for officers and from attending the meetings, and from all participation in the affairs of the corporation. He has frequently demanded that said privileges be restored to him, but the demand has been refused, upon the ground that he had been expelled from the corporation. His said expulsion was illegal, because contrary to the regulations of the corporation, in that he was never fully and fairly informed of the nature of the charges against him, nor served with notice of the time and place of trial, nor permitted to be fully and fairly heard, nor to know the names of his accusers, nor to hear the evidence offered against him, nor to offer evidence in his own behalf. The corporation has a large fund to which the relator has contributed, and in whose distribution he, as a member, would be entitled to share. The relator tendered all assessments made against members, prior to the commencement of the action.

Issues were joined by answer and reply, and the plaintiff introduced evidence, tending to establish the facts alleged in his petition. After hearing the evidence offered by the parties, the circuit court found in favor of the relator, and ordered a peremptory writ of mandamus, restoring the relator to membership in the corporation.

A petition in error is filed here for the reversal of the judgment of the circuit court.

Merrick & Tompkins and Cyrus Huling, for plaintiff in error.

Nash & Lentz, Louis G. Addison and Lincoln Fritter, for defendant in error.

SHAUCK, J.

Numerous questions are presented by the record and discussed in the briefs of counsel, but enough of the case has been stated to raise the only question which is thought deserving of attention: Whether mandamus will lie for the redress of such grievances as are alleged in the petition.

Courts in other states have allowed the writ so frequently in cases quite similar to this, that some writers on benefit societies have stated it as a general rule, that if a member is wrongfully expelled from a society he may be restored by mandamus. We have, however, to determine the question in accordance with the provisions of our own constitution and statutes upon the subject. The legislation upon the subject of mandamus is in Chapter two, of Title four, of the revised statutes. While the procedure with respect to this form of relief has been brought approximately into subjection to the provisions of the code of civil procedure, the writ retains its extraordinary and prerogative character. It may be that the legislature has not attempted to deprive it of that character, because it has regarded itself as without power to do so. The constitution vests original jurisdiction in mandamus in the circuit court and in

the Supreme Court. Through repeated decisions it has become well known, that the general assembly cannot add to the original jurisdiction of those courts, because the constitutional grant is exclusive. An attempt to enlarge the purposes of the writ so as to make it a substitute for actions at law and suits in equity would fail, as an attempt to accomplish a forbidden purpose by indirection. This may account for the fact that the legislature has not attempted to add to the purposes for which the writ may be resorted to as they were known at the adoption of the constitution. It is doubtless because of the extraordinary character of the remedy that it is prosecuted in the name of the state, and original jurisdiction with respect to it is conferred upon the higher courts which have not original jurisdiction in private actions at law and suits in equity.

That the general assembly may increase the number of cases in which resort may be had to this remedy, is not doubted. Indeed, it does so whenever it enacts a law which specially enjoins the performance of an act as a duty resulting from an office, trust or station. But such laws do not change the character or purpose of the remedy.

Contemporaneously with the adoption of the constitution, the legislature defined mandamus as "a writ issued in the name of the state, to an inferior tribunal, a corporation, board or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." This, like the other provisions of the statute, did not change the character of the writ or the purposes for which it may be invoked, but only reduced to the form of a statute the commonly accepted definitions and principles upon the subject. This definition recognizes the public character of the action, and clearly excludes the idea that it may be resorted to for the purpose of enforcing the performance of duties in which the public have no interest. That interest is appropriately manifested by a statute enjoining the particular act as a duty resulting from an office, trust or station. "The object of the remedy by mandamus is to compel public officers and private individuals, in matters relating to the public, to perform their public duties." *Tillson v. Commissioners of Putnam county*, 19 Ohio, 415. This is only saying that private actions are appropriate for the redress of private wrongs.

The definition shows with perhaps even more clearness, that mandamus is not a preventive remedy. It is essentially a coercive writ. It commands performance, not desistance. The real grievance of the relator is that he is unlawfully excluded from participation in the advantages of membership in the corporation, and the appropriate remedy would be that the corporation desist from such exclusion, or compensate him in damages for the wrong. The inference from the nature of the writ, that its extraordinary character is incompatible with the redress of private wrongs, is in accordance with the express provision of the statute (sec. 6744): "The writ must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law." Assuming that the relator is wrongfully excluded from participation in benefits, he may recover, in an action at law, the damages he has sustained. If that remedy would be inadequate, he would be entitled to an injunction to prevent his further exclusion. Whether his remedy would be at law or in equity we need not determine here, for in this comparison both of those remedies are in the ordinary course of the law.

Fraternal Mystic Circle v. State.

Some of the numerous cases cited by counsel for the relator are, in view of the provision quoted, opposed to his position, since they hold that in such case injunction will lie, to prevent the exclusion of the members. In some the writ of mandamus has been allowed without consideration of the propriety of the remedy. None of them offers such reasons for its allowance as would be entitled to prevail against the objections stated, if it were yet an open question. It is, however, held in *Freon v. The Carriage Company*, 42 Ohio St., 30, that "mandamus is not the proper remedy to enforce the performance of a duty imposed upon the officers of a private corporation, organized for profit merely, where such duty is not specifically enjoined by law, and where there is a plain and adequate remedy either at law or in equity." The point there authoritatively decided is, according to a familiar rule of this court, stated in the syllabus.

The provisions quoted from the statute, and the case cited, justify the conclusion that the writ should not have been allowed in favor of the relator, because the act whose performance is commanded, is not specially enjoined by law, and because the relator, assuming that he has a cause of action, has a plain and adequate remedy in the ordinary course of the law. That conclusion is inferentially supported by numerous other decisions of this court in which the writ has been refused. We find no decision of this court in which the writ has been allowed in cases or upon principles inconsistent with the conclusion stated.

Although both remedies are administered in the same court, it has generally been held that a suit to enjoin cannot be maintained where an action for damages would afford adequate relief. But the distinction in this respect, between mandamus and remedies in the ordinary course of the law, is obviously of much greater importance, since by the allowance of the writ of mandamus in forbidden cases, the circuit court and this court would, in effect, extend their original jurisdiction beyond the constitutional grant upon that subject.

Judgment reversed, and the original petition dismissed.

MINSHALL, J., dissents.

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ACCOMPLICE AND ACCESSORY—

1. It is not enough that one prosecuted as a principal, under the statute, for aiding, abetting or procuring another to commit a crime, should merely have known before its commission that the principal intended to commit the crime, nor would knowledge coupled with consent that the crime be committed be sufficient to convict such accessory as a principal. *State v. Snell.* 670

2. The jury must be satisfied beyond a reasonable doubt that such accessory advised, hired, incited, commanded or counseled, so as to have been effective, the principal to commit the crime. *Ib.*

3. The testimony of an accomplice in crime should be very cautiously received and suspiciously scrutinized by the jury. It would be unsafe to convict upon the uncorroborated testimony of an accomplice. *Ib.*

4. Where a burglar's outfit is found in the possession of a criminal, this fact constitutes evidence which may indicate a combination of criminals from which the jury are to determine where or not one of defendants was an accomplice of another. *State v. Flavel.* 158

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Section 6088, Rev. Stat., requiring publication of notice of appointment of an executor, is not complied with by a publication of such notice in a German newspaper of general circulation.

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1. An affidavit drawn and ready for the signature and jurat of the officer, ready to be sworn to, but not sworn to, will be disregarded. *Jay v. Squire.* 318

2. When offense is laid in the continuendo no specific time need be alleged in the affidavit. *Brown v. Toledo.* 210

3. The affidavit charging a person with violation of the "Pure Food Laws," should contain such a statement of the nature and cause of the accusation as would impart to the accused reasonable information of the charge, so as to enable him to prepare his defense. *Emery v. State.* 121

4. An affidavit substantially in the words of the statute upon which the prosecution is based, is sufficient where the statute itself sets forth and defines the offense. *Ib.*

AGENCY—

1. Before acts of an agent, which by estoppel, are to be construed as fastening a lien for assessment upon certain property, the agency to perform such acts must be clearly shown by those who seek to avail themselves of the estoppel. *Andrew v. Auditor.* 242

2. The knowledge of the agent of an insurance company, that the applicant for insurance had only a dower interest to be insured, is the knowledge of the company, and in absence of fraud on part of assured, the company is bound by the knowledge of such agent. *Hilliard v. Caledonia Ins. Co.* 576

APPEAL—

1. An appeal will not be quashed, because the appeal bond is signed by a bank which has no authority to bind itself. *Geirl v. Met. Life Ins. Co.* 156

2. An order of the probate court confirming a sale made by an assignee in insolvency is a final order, and so affects property rights that an appeal will lie to the court of common pleas from such order. *In re assignment of Schumacher.* 386

Arrest—Assessments.

ARREST—

1. Where arrest is made upon affidavit which contains sufficient allegations to constitute a charge under one section of an ordinance and some words found in another section, describing another and different offenses, proceedings will not be quashed on ground that separate and distinct offenses are charged, but all words not necessary to describe an offense under the first section will be stricken out as surplusage. *Brown v. Toledo*. 210

2. An offender under the statute specifying who shall be deemed tramps, and providing a penalty for a tramp found carrying firearms or other dangerous weapons, may be arrested without warrant. *State v. Pate*. 732

3. Any resistance to such arrest is unlawful, and if the offender, in such resistance, shoots and kills the officer, he is guilty of manslaughter. *Ib.*

4. The person making such arrest, however, should use only such force as is commensurate with his purpose, and if he uses more, he becomes a trespasser and would not be any more excused than if he pursued the prisoner for any unlawful purpose. *Ib.*

5. The purpose of the person making the arrest is a question for the jury. *Ib.*

6. If the conduct of the person making the arrest is such as to put the offender under great fear of death or great bodily harm, reasonably to be apprehended, then he would be justified in resisting even to taking the life of such person. *Ib.*

7. The mayor of any city of the second class, fourth grade, has jurisdiction in criminal cases throughout the county, and may by warrant cause any person charged with the commission of a felony to be arrested and brought before him for the purpose of inquiring into the complaint. *State v. Miller*. 703

8. And it is the express duty of the marshal of such city to execute all warrants and writs so issued. *Ib.*

9. Such officer and such assistants as he may deem necessary are under the protection of the law while in the exercise of such lawful authority. *Ib.*

10. The officer is not required to produce the warrant or his authority before making the arrest. *Ib.*

11. The accused has no right to demand an inspection of the warrant until after he has placed himself peaceably in the custody of the officer, knowing him to be such. *Ib.*

12. If accused, by words or threats, resists arrest and is visibly prepared to make resistance, the officers may resort to any stratagem, or employ any force which they may deem necessary, to throw accused off his guard, in order to accomplish the arrest without injury to themselves. *Ib.*

13. Where, in making an arrest, a struggle ensues between the officer and the accused, it is the duty of the officer's assistants to come to his aid, whether commanded to do so or not. *Ib.*

14. Where the parties attempting to make the arrest were officers of the law, charged with the duty of taking accused into their custody, and accused knew these facts, then he could have no reasonable ground for believing that he was in danger of death or great bodily harm. *Ib.*

ASSESSMENTS—

1. The law as it now stands gives a city council authority to exercise its judgment as to what assessments shall be made against a corner lot. *In re Corner Lot*. 577

2. If a lot abuts lengthwise on the improvement, but fronts breadthwise on another street and not on the improvement, the lot should be deemed as fronting breadthwise on the improvement, and be assessed for the number of feet on the improvement that it would have in such case, and no more. *Bentley v. Toledo*. 165

3. A barn having been built on the rear of the lot, and actually fronting the house, which fronted on another street, does not make a foot frontage, though it has an entrance from a side street. *Daiber v. Toledo*. 164

4. The use of a street may be merely incidental, so as not to create a frontage of a corner lot as to a side street. *Ib.*

5. A frontage of a lot is determined by reference to the manner of its principal use and occupation. *Turner v. Cincinnati*. 97

6. A lot occupied by a building used for a store and dwelling with a large entrance door and show window fronting on one street, and a door for entrance to the dwelling portion on another, will be deemed to front on the street occupied for the main or store entrance. *Ib.*

7. The only limitations upon amount of sewer assessments are those contained in the subdivision specially relating to sewers. *Macomber v. Hunter*. 96

Assessments.

8. A sewer improvement is not a street improvement. Abutting lands may, therefore, within five years be assessed for improving a street by grading, etc., and for constructing a sewer in it, although the cost of both assessments exceeds twenty-five per cent. of the value of the lands. *Cincinnati v. Jung*. 549

9. The value of abutting lands fixed by the superior court in a suit to enforce assessments for street improvements, is not conclusive in an action to enforce assessments for construction of a sewer. • *Ib.*

10. The fact that the sewer is of no actual benefit to defendant's property is immaterial. *Ib.*

11. Where the court reduces an assessment because it is more than twenty-five per cent. of the value of the property, no penalty can be recovered. But where assessment is not reduced, defendants should pay interest and penalty. *Ib.*

12. Where the assessment is not reduced the costs will be equally divided between plaintiffs and defendants. *Ib.*

13. It would seem that within five years three assessments, each for twenty-five per cent. of the value of the property, might be levied to cover the cost of improving a street by grading and paving, by constructing a sidewalk, and by laying a sewer. *Cincinnati v. Fugman*. 530

14. Where an assessment is found to be excessive and is reduced by the court, no penalty should be recovered, for at no time did defendant owe the amount claimed, and was justified in resisting its collection. *Ib.*

15. It is immaterial that the sewer is of no actual benefit to the property assessed; the exercise of the power to construct the sewer and levy an assessment for the cost presupposes the question of benefits to have been determined. *Ib.*

16. The limitations in sec. 2271, R. S., apply to each assessment separately where more than one is made, and each assessment is valid to the extent of 25 per cent. of the value of the lot after the improvement is made. *Cole v. Hunter*. 142

17. The improvement of a street by first paving and afterwards by building a sidewalk does not come within sec. 2283, Rev. Stat. *Toledo v. Bank & Trust Co.* 97

18. When a lot is already provided with sewer drainage, the owner cannot be assessed for another sewer. *Miller v. Toledo*. 162

19. The law of 1878 (75 O. L., 313), relating to taxation, permits special improvements, and allowed assessments upon abutting owners. *Toledo v. Grasser*. 178

20. The determination of the council as to the kind of plans for any given improvement cannot be questioned in the courts. *Ib.*

21. The "substantial defect" contemplated by 75 O. L., 313, must relate to the construction provided for by a contract legally adopted. *Ib.*

22. The city cannot, by acceptance of the work without a substantial compliance with the terms of the contract, affect the right of a citizen to plead such non-compliance as a complete defense to an action for the collection of an assessment therefor. *Ib.*

23. What is a "substantial defect," depends upon the facts of each case, in view of the objects sought by the improvement, and their attainment of the work done. *Ib.*

24. The petitions of property owners filed in accordance with the provisions of an act passed April 13, 1893 (90 O. L., 224), which provides for the improvement of certain streets, will become absolute and must be held to speak as of the date when the commissioners first assumed jurisdiction on them, and acted in the matter, and must be measured as of that date as to the number of front feet signed to such petition. *Andrew v. Auditor*. 242

25. *Quære*, as to whether the word "filed," as used in this act, signifies an act of the petitioners, of the county commissioners, or a mutual act of both. *Ib.*

26. It is probably fairer to the county to give the word the significance of an act performed by the petitioners. *Ib.*

27. The signature of the firm name, signed by a surviving partner to such petition, cannot be counted as more than the signature of such surviving partner and will only represent his pro rata portion of foot frontage. *Ib.*

28. Where an owner of corner lots unites with others in such petition, and states therein the number of feet his property abuts on such street, he becomes bound for the full number of feet fronting on such street and represented by the figures appended to his signatures, and such owner is estopped to avail himself of the decision in the *Haviland* case. *Ib.*

29. Such estoppel, however, does not apply to the other petitioners; as to them the corner lots must be con-

Assignments—Assignment for Creditors.

ASSESSMENT—Continued—

sidered with reference to their actual frontage, determined as per the Haviland case, instead of their abutting length on the proposed improvement.

Ib.

30. Where the trustees of certain property sign a petition, as trustees, for the improvement of a certain street, each of such trustees, to the extent of their individual interests in the property represented by such signatures, are estopped to deny such signatures, but are not estopped to deny that the commissioners ever obtained the requisite majority, or to set up any irregularities in the proceedings by the commissioners.

Ib.

31. When the council adopts one of the modes of assessment, as provided for by sec. 2284, Rev. Stat., the court has no power to substitute another mode of assessment. *Toledo v. Ainsworth*.

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32. Section 2283, Rev. Stat. applies only to property abutting on one street and assessed for improvement there and afterwards assessed for the improvement on another street; and an improvement of a street by first paving and afterwards by building a sidewalk does not come within the provision of this section; and it was further held, that if this section had contemplated limiting the assessment on one street, the words on "on two streets" as used in this action would have been omitted. *Toledo v. Bank & Trust Co.*

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ASSIGNMENTS—

A mortgage executed to A and others to secure payment of several notes, one of which was payable to A; A assigned the mortgage to B by the following indorsement: "For value received, I hereby assign and transfer to B, his representatives and assigns, the within mortgage and notes thereby secured," etc., and pretended to transfer all notes described in the mortgage by forging the names of the owners thereof. B took the notes without knowledge of the fraud. Subsequently A, being indebted to C, transferred and assigned by indorsement the genuine note payable to himself, to C, who took it before due and without knowledge of the fraud perpetrated upon B: Held, that as between B and C the latter was entitled to payment of the note, and that the benefit of the mortgage passed with the transfer of the note. *Martin v. Martin*.

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ASSIGNMENT FOR CREDITORS—

1. Where the owner of certain real estate conveys it by deed to third persons as trustees, which deed provides that such trustees are to convert the realty into money and pay all liens upon said premises in order of priority, and to distribute balance equally to creditors of grantor, so that no preference shall be given to one creditor over another: Held, that such deed is a deed of assignment for benefit of all the creditors of such grantor, and comes within the purview of our statute relating to insolvent debtors. *In re Jones*.

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2. The act governing voluntary assignments, commencing with sec. 5335, Rev. Stat., is a special act, made especially applicable to assignments for benefit of creditors, and being a special act making special provisions for deeds of assignment to be controlled by the probate court, it becomes exclusive and deprives all other courts of jurisdiction of such deeds.

Ib.

3. A deed of assignment in the ordinary form, conveys a trust estate to the assignee, and it is his duty under the statute to file the deed in the office of the probate court of the proper county, within ten days, give a sufficient bond, and proceed to administer the trust, and after paying the debts of the assignor and costs of administration, the residue is paid to the assignor.

Ib.

4. The fact that this deed was drawn in the form in which deeds of assignment are usually drawn, and the further fact that the assignees are called "trustees," will not operate to change the character of the instrument.

Ib.

5. Where such deed purports to convey all the property of the assignor, for benefit of his creditors, that fact alone carries with it the presumption that he was unable to pay his debts.

Ib.

6. In a proceeding by an assignee for creditors, to sell the real estate assigned, the court has power upon cross-petition of a defendant mortgagee to grant such defendant affirmative relief, and order assignee to sell the property in the mortgage described and apply the proceeds therein. *Keifer v. Spence*.

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7. An assignee for benefit of creditors takes the property subject to the rights which existed at time of assignment, and if no creditor has a superior equity to a mortgage, and the same is not prevented by statute, he may have his mortgage reformed and

Attachment—Attorney and Client.

declared a lien upon the property in the hands of the assignee. *Adlard v. Stockstill.* 493

8. Inasmuch as under the Ohio law a valid assignment by a firm for benefit of creditors cannot be made except by or with assent of all members, the court of insolvency can only obtain jurisdiction by the filing of a deed in which all parties have joined. *In re Roberg & Co.'s Assignment.* 585

9. An assignee is a trustee in every case. *In re Jones.* 233

10. An order of the probate court removing an assignee of an insolvent debtor, is not a final order from which error can be prosecuted by such assignee. *Ib.*

11. He has no substantial personal or property right to be affected by his removal. *Ib.*

12. He has no interest in the administration of the estate except to perform his duties according to law and the order of the court. *Ib.*

13. An order of the probate court confirming a sale made by an assignee in insolvency is a final order, and so affects property rights that an appeal will be to the court of common pleas from such order. *In re assignment of Schumacher.* 386

14. A claim due for labor performed three months prior to an assignment is not superior to the lien of a previously executed chattel mortgage. *In re Hobelman's Assignment.* 403

15. The clause in sec. 3206a, Rev. Stat., providing that such claims have preference over all others, applies to liens on a trust fund, whether such fund is realized from the sale of real or personal property. *Ib.*

ATTACHMENT—

1. An attachment will lie in a suit to recover money lost in a slot machine. *Wise v. Martin.* 550

2. Damages for an attachment which is dissolved cannot be awarded unless it is shown that the attachment was malicious prosecution. *Ault v. Jones.* 558

ATTORNEY AND CLIENT—

1. The authority of an attorney is terminated by death of his client unless such authority is coupled with an interest. *Villhauer v. Toledo.* 8

2. A contract between a client and his attorney that the attorney shall receive, as compensation for his services, a certain percentage upon the sum recovered does not create such an interest as will prevent the death of the client from operating as a revocation of the attorney's authority. *Ib.*

3. If in such case the client dies after a judgment has been recovered, and such judgment is paid to a third person upon the order of such attorney, and no part of the amount was received by the client's administrator: Held, that such payment of the judgment was unauthorized and the administrator may maintain an action against the city on the judgment. *Ib.*

4. Inasmuch as good moral character is one of the requisites for admission to the bar, it follows that the courts have power of removal when such character is wholly lost. This power is inherent and exists independent of statutory provisions. *In re Swadener.* 598

5. While authorities are not entirely harmonious as to whether mere delinquency as ordinary trustee is ground for suspicion or removal of an attorney, yet authorities generally hold that offenses which are evidence of criminal character, as appropriating money collected in a fiduciary capacity, are ground for suspension or removal. *Ib.*

6. Disbarment proceedings are not by way of punishment nor to enforce a settlement with the injured party. *Ib.*

7. The fact that an attorney has been punished criminally, or has fully settled all claims made, will not relieve him from the penalty of suspension or removal for misconduct. *Ib.*

8. The leniency of the court should be exercised, if at all, when after the lapse of sufficient time the attorney has shown by his conduct that he is worthy of re-instatement, rather than by anticipating some time when he may be worthy of re-instatement. *Ib.*

9. An attorney who is employed to collect a claim may, without express authority so to do, make the affidavit required by sec. 6357, to a chattel mortgage securing the claim. *In re Assignment of Merling.* 390

10. But where such affidavit is made by an attorney prior to his employment to collect the claim, a subsequent ratification of his action by the mortgagee does not give validity thereto. *Ib.*

11. Attorney fees cannot be allowed in proceedings for a change of grade, where the city refuses to proceed. *Toledo v. Jacobson.* 170

12. Bills fixed by judges as fees for lawyers in criminal cases are not reviewable by the county commissioners. *State v. Commissioners.* 579

13. In an action against the city on assessments which prove to be ille-

Auction Sales—Bonds.

ATTORNEY AND CLIENT—Con.—

gal or invalid, plaintiff is not entitled to recover counsel fees paid by him in such action. *Gates v. Toledo.* 168

14. Action to recover amount of a sidewalk assessment and attorney's fees expended in an assessment suit against the owner of property in front of which the sidewalk was constructed, in which suit plaintiff was defeated: Held, that plaintiff could recover attorney's fees. *Golden v. Toledo.* 32

AUCTION SALES—

1. Tobacco is not "produce" within the meaning of the auction license law, and is not, therefore, exempt from the requirements of that law. *Cincinnati v. Withers.* 570

2. The method of selling tobacco "on the brakes" in Cincinnati does not come within a proper definition of the term "auction sales." *Ib.*

3. One who is no more than an employee in conducting a sale is not subject to prosecution under the auction license law. *Ib.*

BANKS AND BANKING—

1. Where a note is deposited with a bank for collection, it has no authority to accept anything but money as payment; and, therefore, giving a check, which the bank accepted, is not payment. *Dunn v. Dewey.* 149

2. Where the clerk deposits funds with a bank as clerk of the courts, the bank has no authority to pay out such funds on the individual check of such clerk, even though there was printed on such checks the words "county clerk," and if the bank paid such checks, it, and not the bondsmen of the clerk, is liable to the county for the amount so paid. *State v. Hobson.* 442

BILLS OF EXCEPTIONS—

A bill of exceptions allowed by a magistrate on the fourteenth day after the trial, is not a valid bill, the statute not permitting a magistrate to extend the time for presenting a bill beyond ten days. *Echelman v. Heil.* 561

BILLS AND NOTES—

1. A power of attorney to confess judgment, attached to a note, and forming a part of the same instrument, does not destroy the negotiability of the note. *McClure v. Bowles.* 288

2. Such power is not negotiable, and when the note is transferred, becomes invalid and inoperative. *Ib.*

3. A note indorsed in blank passes by delivery and not by assignment, the same as if drawn payable to "bearer." *Ib.*

4. Where a note is deposited with a bank for collection, it has no authority to accept anything but money as payment; and, therefore, giving a check, which the bank accepted, is not payment. *Dunn v. Dewey.* 149

5. A broker's failure to secure, in accordance with his oral agreement, the cancellation of a mortgage on real estate taken in exchange or as payment for real estate sold by said broker, is no defense to notes executed and delivered by vendor to the broker as commission for making the sale or exchange, although the oral promise was part of the consideration for the notes. *Wade v. Bishop.* 625

BONDS—

1. The bondsmen of the clerk are liable for money received by him as clerk of the superior and circuit courts, although the bond refers solely to the clerk of the court of common pleas. *State v. Hobson.* 442

2. The term "clerk of the common pleas courts," is merely his title, and he is, under the statute, clerk of the superior and circuit courts. *Ib.*

3. The bondsmen are entitled to set-off against their liability the amount of the salaries due the deputies of the clerk, though such salaries were irregularly paid, and also the unpaid salary of such clerk, he not yet being convicted of misconduct in office, so as to forfeit his salary. *Ib.*

4. The bondsmen of the clerk are liable for all moneys received by the clerk from his predecessor, since under sec. 1340, Rev. Stat., it is the duty of a clerk to pay over to his successor all moneys received by him as clerk, whether the receipt of such money by him was proper or not. *Ib.*

5. An action by one bondholder "in his own behalf as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of the suit" is binding only on those who are made or become parties to the suit. *Adelbert College v. Railway Co.* 14

6. The parties who are not named are not parties to the suit and are not bound by proceedings therein, unless they elect to come in and claim as such, and bear their proportion of the expenses, or unless, after having had notice, they refuse or neglect to do so. *Ib.*

Bribery—Building and Loan Associations.

7. Such suit does not come under that provision of the chancery practice which provides that when the question is one of common or general interest of many persons, or when the parties are very numerous, one or more may sue for benefit of all; for, by express averments of the bill, the benefit of the litigation was offered only to such other bondholders as should elect to come in and make themselves parties. Ib.

8. The fact that by the final decree the court found the amount due on the entire series of bonds and declared the same a lien, and ordered the property sold, did not change the character of the suit, or affect the bondholders who were not parties, and is not, therefore, *res adjudicata*. Ib.

9. Even though it should be held that such suit becomes a class or representative suit by the final decree of the court in which it was brought, although the other bondholders were not brought in, by reversal that decree becomes a nullity and by the subsequent dismissal of the bill only the complainants are bound. Ib.

10. Suits brought by individual bondholders in which no relief is sought or obtained in behalf of other bondholders, and in which they were not permitted to become parties, presumably because the suit was an individual one, do not constitute a bar to the subsequent suits of other bondholders of the same class. Ib.

BRIBERY—

1. It is not necessary, in order to establish the crime of bribery, under the statutes of Ohio, that the money should be counted out or tendered by accused. *State v. Iden*. 627.

2. The statement that he will pay a certain sum, although no time is fixed for payment, is sufficient proof of the fact of an offer or a promise by accused. Ib.

3. Where a member of the legislature was simply expressing the opinion that a certain committee wanted money, or that money would have to be paid to such committee to induce it to report a certain bill, such acts cannot be considered as criminal. *State v. Gear*. 652.

4. But if such member solicited the money, with the intention it should influence his official action, it was a crime. Ib.

5. A member of the legislature who invites any person to pay money to engage another to appear before a committee to argue for or against a bill, is guilty of soliciting a bribe. *State v. Abbott*. 650.

6. It is a crime for a member of the legislature to solicit from any person any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment, in any matter pending that might legally come before him. *State v. Geyer*. 646.

7. The state is not required in such cases to prove that the money was actually paid or that the accused solicited it for his own personal use, or that it was the only consideration that was to influence him with respect to his official duty. Ib.

BRIDGES—

1. Where a city is not entitled to demand, and has not demanded, a part of the bridge fund, it is not bound to keep the bridges within its limits in repairs. *Sullivan v. Newark*. 388.

2. The duty of repairing such bridges falls upon the county commissioners and township trustees, and, therefore, such city is not liable in an action for damages for injuries received by a person by reason of a bridge within its limits being out of repair. Ib.

BUILDING AND LOAN ASSOCIATIONS—

1. Borrowing members of a building and loan association are entitled to dividends on the amount paid in each year and a rebate of interest on amount paid in from beginning at end of each year. *Atlantic Building Assn. v. Vogeler*. 581.

2. The company having been organized before law of 1880 was passed, and defendant's assignor having been a member under this system from the beginning, and defendant having taken the benefit of this plan for several years before objecting, is estopped from having accounts of company recast upon another basis. Ib.

3. Members of a building association, in the event of its insolvency, are liable to contribute in the same proportion in which they would be entitled to share in profits. *In re Building Association*. 556.

4. Where, under the present law, the association limits, by its constitution, the mortgage members from sharing in any profits except as to dues paid into the credit of capital during each current year, so is their liability to contribute to losses and expenses limited thereto. Ib.

5. An unauthorized payment to a contractor, by a loan company out of money borrowed for building pur-

Burglary—Chattel Mortgage.

BUILDING AND LOAN ASSOCIATIONS—Continued—

poses, must be made good by such loan company. *Kestina v. Donahue*. 153

6. Since the amendment of sec. 3833, R. S., by the act of May 1, 1891, a building and loan association, where its constitution and by-laws contain ample authority, may charge a member any sum as a premium for a loan, without the sum so charged having been bid by the member as a premium for such loan. *Peoples Sav. and Loan Assn. v. Roberts*. 489

7. The fixing of such premiums by the association, which together with the assessments and interest agreed upon would make the interest exceed the legal rate, does not make the contract void for usury, because of provision of statute. *Ib.*

BURGLARY—

1. If a door is locked, or fastened by a cleat, with hasp and staple, and sealed, the force sufficient to break off the cleat and remove the seal and other fastenings constitutes sufficient force to meet the requirements of the statute relating to burglary and larceny. *State v. Long*. 617

2. If a door is partially open, and the only force used was to further open the door, that would not constitute a forcible breaking in the sense the statute uses the term. *Ib.*

CARRIERS—

1. A railroad company, as a common carrier, is bound to furnish cars for the transportation of freight, and it must have control of its cars in order to perform its duties to the shipping public. *Railroad Co. v. Fisher*. 659

2. It may make and enforce reasonable rules and regulations to secure the prompt unloading of its cars. *Ib.*

3. Where a number of railroad companies, by mutual agreement, enter into a car-service association, and such association adopts such reasonable rules and regulations, it is the same in effect as if each company for itself had adopted the same. *Ib.*

4. A rule requiring consignees, on receiving notice of the arrival of cars, to unload the same within four days thereafter, or pay the delivering company \$1 per car per day, for all time over said period that such cars shall remain on tracks of said company without being unloaded, is reasonable and, therefore, legal and valid. *Ib.*

5. Before such rule can be enforced against a particular consignee, it must be shown that he had knowledge of it, and that the cars, on their arrival, were placed on the side tracks of the company in suitable and convenient places for unloading, and were so kept for the full period of four days. *Ib.*

6. But a car need not be kept for said period in the same spot or place on the side track. *Ib.*

7. If a car is placed and kept in a suitable place for unloading for the four days prescribed by the rule, and the consignee fails to unload it, he will be liable for car-service thereafter though the car may not at all times be in a convenient place for unloading, provided he is not thereafter unreasonably hindered and delayed in unloading. *Ib.*

8. But if a car is shifted from day to day and from place to place, and is not at any time, for the full period of four days, in a suitable place for unloading, the company cannot recover car-service therefor. *Ib.*

9. A railroad company has no right to confiscate a mileage ticket, purchased by a ticket broker in a fictitious name, and upon which another person is travelling, without offering to refund the money. *Morton v. L. E. & W. Ry.* 590

10. Where one railroad permits another road to use a portion of its tracks, such railroad is performing the duty of a common carrier in supplying an instrumentality of transportation, and can charge only a reasonable sum for such use, the same to be determined by the jury. *Railroad Co. v. Railroad Co.* 147

CHATTEL MORTGAGE—

1. Where upon a chattel mortgage, being given, the mortgagee takes possession, it is not necessary to file or re-file the mortgage. *Fuhrer v. Buckeye Supply Co.* 187

2. A chattel mortgage withheld from record and filed just before application is made for a receiver, is constructively in fraud of creditors and void as to them. *Retzsch v. Retzsch Printing Co.* 574

3. A vendor and mortgagee, having permitted vendee and mortgagor to exchange the article mortgaged for another upon which no mortgage is taken, is a general creditor only and not entitled to preference. *Ib.*

4. A chattel mortgage filed Oct. 13, 1882, at 3:05 P. M., and re-filed Oct. 13, 1883, at 11:15 A. M., held superior to the lien of a deed of assignment filed

Clerk of Courts—Comity.

Aug. 1884, and continued so until Oct. 13, 1884, at 11:15 A. M. In re assignment of Landman. 390

5. A chattel mortgage given by a failing debtor prior to his assignment to secure payment of an attorney's fees in connection with the assignment, must be denied a preference. In re assignment of Merling. Ib.

6. An attorney who is employed to collect a claim may, without express authority so to do, make the affidavit required by sec. 6357, to a chattel mortgage securing the claim. Ib.

7. But where such affidavit is made by an attorney prior to his employment to collect the claim, a subsequent ratification of his action by the mortgagee does not give validity thereto. Ib.

8. Where it is a part of the mortgage contract that the mortgagor is to remain in possession and sell, and there is no agreement to account for the proceeds, the mortgage is *per se* fraudulent and void as to other creditors. Ford v. Miller. 603

9. But where the mortgagor remains in possession merely by sufferance and sells, the mortgage is not *per se* fraudulent. Ib.

10. A chattel mortgage to the mortgagor's wife for a valid debt will not be held fraudulent and void as to other creditors, because mortgagor was permitted to remain in possession and sell goods for a few hours without any agreement to account for proceeds. Ib.

11. Although such mortgage is presumptively fraudulent, such presumption may be overcome by showing good faith of the parties, and that no actual injury resulted to creditors thereby. Ib.

CLERK OF COURTS—

1. The duty imposed upon the clerk of the courts by sec. 1325, R. S., as to receiving "all moneys payable into his office," is in addition to the other statutory duties, providing for the receipt of money, devolving upon him. State v. Hobson. 442

2. Under the statute the clerk must perform the duties of a clerk at common law; such a clerk was to perform any and all duties which the court might impose, or which in the administration of the common law he should do, or the court might order done in the exercise of its judicial functions. Ib.

3. He would, therefore, be the legal custodian of money ordered paid into court, by the court, or paid in on judgment. Ib.

Liability of bondsmen of the clerk—see bonds.

COLLATERAL INHERITANCE TAX—

1. Bequests to charitable institutions are not exempt from collateral inheritance tax. Simon's estate. 548

2. Nor are bequests to great-nieces exempt from said tax. Ib.

3. But where the widow has a right to use part of the principal of the remainder, the value of her estate in the same is nota ascertainable, and, therefore, legacies over to the non-exempt persons are not taxable. Ib.

4. Half brothers are exempt from collateral inheritance tax. In re Ormsby's estate. 553

5. The statute exempts nieces and nephews of decedent from payment of the collateral inheritance tax. Bates' estate. 547

6. Such exemption does not extend beyond the children of decedent's brothers and sisters. It does not, therefore, include nieces of husband or wife. Ib.

7. Grand-nieces and charitable institutions are liable to the tax. Ib.

8. Where there was no effort made to enforce the law, pending litigation to test its constitutionality, executors were not negligent in failing to pay it within the year, and there is no basis for the penalty. Ib.

9. Inasmuch as "all property which shall pass . . . shall be liable to a tax of five per centum of its value above the sum of \$2,000," it matters not whether the property passes under one or more items of the will, or whether property passing under more than one item be real or personal, the tax is collectable on the aggregate of such property, less \$200, which is exempt. In re Inheritance Tax. 555

COMITY—

1. The comity between states will permit a receiver to collect money due the firm he represents in a state other than the one in which he was appointed, provided no injury is done to a resident in such state. In re Besuden Co. 565

2. The usury laws of another state will be upheld in an action in this state upon an obligation executed in such state. Omaha Loan and Trust Co. v. Bellew. 159

3. The decision of the Supreme Court of Illinois, determining the validity of a title to land situated in that state, is binding upon the court and jury in this case. Spencer v. King. 113

Conspiracy—Contracts

CONSPIRACY—

1. A conspiracy is a combination of two or more persons by some concert of action to accomplish some criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means. *State v. Snell.* 670

2. Where a person is prosecuted as principal, charged with a crime committed as the result of a conspiracy, the state must prove beyond a reasonable doubt that conspiracy was entered into by and between such person and others charged in the indictment and that such person did, through the agency of such conspiracy, procure, bring about, compass or effect the crime with which such person is accused. *Ib.*

CONSTITUTIONAL LAW—

1. The statute authorizing county commissioners to improve rural street is unconstitutional. *Sullivan v. Williams.* 577

2. The law requiring boards of education to pay assessment for street improvements out of their own funds is constitutional. *In re School Property.* 577

3. An ordinance requiring all screens to be removed from the doors and windows of saloons is constitutional. *Washington v. Gallagher.* 562

4. The act of 1890, so far as it undertakes to prohibit voluntary contracts, such as those referred to, is unconstitutional. *Farrow v. Railroad Co.* 582

5. The act of May 13, 1894, repealing the struck jury law, does not affect cases pending at the date of its passage. *McDonald v. Lane.* 37

6. The act to prevent deception in sale of dairy products and to preserve the public health (88 O. L., 51), is constitutional. *Holtgreive v. Ohio.* 166

7. Section 7032a, Rev. Stat., relating to base ball playing on Sunday, and making it an offense to play base ball on Sunday, is constitutional. *State v. Goode.* 281

8. The act of the legislature passed April 10, 1896, (92 O. L., 136), and entitled, "An act for the suppression of mob violence," is unconstitutional. *Mitchell's Admr. v. Commissioners.* 262

9. The act of May 1, 1894, 91 O. L., 346, making it unlawful to sell convict made goods, manufactured in the prisons of other states, without first obtaining a license from the secretary of state, is unconstitutional. *State v. Vanders.* 575

10. Section 4469, Rev. Stat., is not unconstitutional, as being in conflict with secs. 5 or 19 of art. I of the constitution. *Emig v. Commissioners.* 459

11. That part of the law which authorizes seizure and confiscation of nets of parties engaged in unlawful fishing, is against the constitution of the state and United States, in that it allows confiscation of private property without due process of law. *In re Fish Seizure.* 553

12. The statute providing that dogs in Cincinnati shall be liable to a tax of \$2.00 or be disposed of if not paid, is an act of a general nature, and being made applicable to Cincinnati only, is unconstitutional for lack of uniformity of operation. *Fagin v. Humane Society.* 596

13. Dogs are property in Ohio, and inasmuch as the act in question provides for the taking of these animals without due process of law it is unconstitutional on that ground. *Ib.*

14. The act of the general assembly, authorizing the commissioners of Hamilton county to improve Michigan and Shaw avenues, in sec. 27, Columbia tp., passed April 13, 1893, (90 O. L., 224), is unconstitutional. *Andrew v. Auditor.* 242

CONSUL—

Under the laws of Ohio, a United States consul is not authorized to act as a notary public in the taking of depositions. *In re Herckelrath's estate.* 565

CONTRACTS—

1. A contract awarded under an advertisement for proposals, made on the tenth or last day of the advertisement of an improvement ordinance, is illegal. *Fath v. Clifton.* 567

2. Where the contract for the improvement of a street provided for the doing of the necessary drainage in the manner directed by the committee on streets and the city engineer; as between the city and an abutting owner, this is a contract to do the necessary drainage. *Toledo v. Grasser.* 178

3. In such case the city cannot shelter itself under the provision that the manner of doing the work was left to the sole discretion of its public official. *Ib.*

4. A contract whereby an employee is prevented from entering the service of his employer's rival within one year, irrespective of cause for which he leaves his employer, or is discharged, is oppressive and unjust;

Coroner—Corporations.

and an injunction should not be allowed to enforce it. *Oil Co. v. Fawcett*. 219

5. Railway relief association contracts are not against public policy. *Farrow v. Railroad Co.* 582

6. A contract for a seat at a theatrical performance made on Sunday is illegal. *Warren v. Theater Co.* 559

7. Bargainings between husband and wife about alimony are unlawful, but the rule is that all agreements of that character be laid before the judge. *Brown v. Brown*. 568

8. They are binding if he approves, but not binding if he dissents. *Ib.*

9. It is the duty of the court to scrutinize all such agreements and see that the wife is not over-reached or imposed upon by the husband. *Ib.*

10. But if the wife chooses to adhere to the contract made with her husband the court cannot compel her to abandon it. *Ib.*

CORONER—

1. Finding a dead body plainly means that it cannot have been before known or discovered; and such finding cannot be predicated of the body of a person who was killed in the presence of a number of witnesses, persons who had no act or part in the killing. *Birmingham v. Commissioners*. 587.

2. The coroner has no power to hold an inquest except in cases where the cause of death is unknown. *Ib.*

CORPORATIONS—

1. Where there is substantially one corporation, or where there may be two corporations doing substantially one thing, the one being at all times in the control of the other; under such circumstances there is no principle upon which one can assert a mechanic's lien against the other. *Iron Co. v. Heating and Ventilating Co.* 292

2. Where a loan is made under the guise of a sale of bonds, at less than par, interest at par being paid thereon, subsequent creditors can not have the excess of interest so paid applied in liquidation of the principal, in the absence of fraud, deceit, or that the loan was made in contemplation of a debt; such facts would, however, entitle the creditors to have a full settlement of the affairs of the corporation. *Walbridge v. Union Mfg. Co.* 203

3. In cases in which the liability of stockholders—before suit to enforce

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their statutory liability is brought—is known to be equal to the face value of the stock, interest will follow from the date of the institution of the suit. *Berger v. Bank*. 277

4. When the ascertainment of that fact must await the findings of a referee, interest should be allowed only from the date of the confirmation of the report. *Ib.*

5. A stockholder in a railway company may sue on behalf of the stockholders to enforce rights when the corporation refuses to sue, and the fact that he may be otherwise interested is immaterial. *Henry v. Railroad Co.* 41

6. A foreign insurance company which loans money upon mortgage security as an investment, does not violate a statute which provides that no foreign corporation or company, doing a banking or any other kind of business in connection with insurance, shall do business in this state, and such loan and mortgage are legal. *Hall v. Kummer*. 176

7. Where a petition contains an allegation of a decree rendered in a former action subjecting stockholders' liability, but does not allege that the corporation was at the time of such decree insolvent, it must be presumed that such insolvency was alleged and proved in that action, since such insolvency was necessary to the action of the court in rendering the decree. *Swan v. Railroad Co.* 297

8. The liability of stockholders is purely a creature of the statute; it is wholly unknown to the common law. *Ib.*

9. Neither at law nor in equity was a stockholder liable for payment of debts of a corporation in which he held stock; he only risked the loss of the investment made by him in the subscription for or purchase of his stock. *Ib.*

10. The statute creates a new right, and where the statute itself prescribes a remedy, that remedy must be exclusively followed. *Ib.*

11. While this liability is, in Ohio, an individual and several liability of the stockholder, on which a personal judgment may be rendered against him, yet it is not an absolute and unconditional liability enforceable against him in any event for the full amount. *Ib.*

12. No right is given to any individual creditor to hold either of any stockholders, or all the stockholders, liable for the payment of his separate debt, to the exclusion or regardless of the rights of other creditors. *Ib.*

Costs—Criminal Law.

CORPORATION—Continued—

13. A final decree having been rendered in a former action subjecting stockholders' liability to the extent of twenty-five per cent of the amount of stock held by them, such decree estops all creditors from prosecuting any other action in this state to enforce the individual liability of the stockholders. *Ib.*

14. So long as such final judgment remains in force, it is a conclusive determination of the liability of the stockholders. *Ib.*

COSTS—

Where the commissioners find in favor of the construction of a ditch, and upon appeal the jury find against its construction, the cost of such proceedings had under sec. 4470, must be taxed to the commissioners. *Thomas v. Commissioners.* 510

COUNTY—

1. A county is not a legal person, natural or artificial, and is not capable of suing or being sued. *Summers v. Hamilton Co.* 553

2. A county is a local political sub-division of the state, created by the sovereign power of the state without particular consent or concurrent action of the people who inhabit it. *Ib.*

COUNTY AUDITOR—

1. It is not an unwarranted stretch of authority for the county auditor to deliver a warrant, drawn in payment for goods purchased, to the selling agent of the company, but payment of such warrant by the county treasurer to such agent is wholly without authority. *State v. Auditor of Hamilton Co.* 545

2. The fact that persons appointed by court of common pleas, and prosecuting attorney, examined the commissioners' report, which included claims of the auditor, and reported it correct, is no defense in an action against the auditor for money claimed to have been illegally drawn from the treasury on warrants approved by the commissioners. *Ottawa Co. Com'rs v. Auditor.* 597

COUNTY COMMISSIONERS—

1. County commissioners have the right, and it is their duty, to elect a superintendent for the public schools when the school board fails to agree upon a selection. *State v. MacKinnon.* 558

2. County commissioners are not necessarily prohibited from expenditure of money for services of

persons necessarily employed for a special purpose, although the statute contains no express provision for such employment. *Barber v. Commissioners.* 98

3. Where there is no suspicion of collusion or fraud to such proceedings the court will decline to interfere by injunction. *Ib.*

4. The statute authorizing county commissioners to improve rural streets is unconstitutional. *Sullivan v. Williams.* 577

5. The proper proceeding upon refusal of county commissioners to allow a fee for assisting in a criminal prosecution, is to take the case up on error. *Mandamus* will not lie. *State v. Commissioners.* 579

6. Bills fixed by judges as fees for lawyers in criminal cases are not reviewable by the county commissioners. *Ib.*

COUNTY RECORDER—

The duty imposed upon the recorder by sec. 1144, Rev. Stat., to indorse upon instruments presented for record the precise time of record, is a ministerial duty only, and is *prima facie* only, and not conclusive evidence of the correctness of the indorsement, so that evidence may be received of the time the deed was actually left for record. *Kalb v. Wise.* 533

COURTS—

1. An acting police judge, appointed by the mayor according to sec. 1802, Rev. Stat., to act during absence or disability of police judge, is at least a *de facto* judge. *Brown v. Toledo.* 210

2. Whether the law vesting in the mayor power to appoint such acting police judge is constitutional: *quaere.* *Ib.*

3. The probate court has exclusive jurisdiction for the determination of chattel mortgage liens and assignment matters. *Graham Lumber Co. v. Julien.* 167

4. The probate court has jurisdiction in a cause of action brought by a legatee to compel the executor to show cause why the balance of the legacy should not be paid to such legatee. In re estate of *Isherwood.* 143

CRIMINAL LAW—

1. A prisoner cannot legally be tried, convicted or sentenced for any crime other than the one for which he was arrested. *State v. Doe.* 572

2. It is not a crime, under the laws of Ohio, to tap a telegraph wire unless a message was taken. *Martin v. Sheriff.* 100

Curtesy—Deeds.

3. A strict construction of the statutes requires that not only should the wire be unlawfully tapped by an unauthorized person but also that a communication or message should be taken therefrom in an unauthorized manner. Ib.

CURTESY—

A surviving husband cannot resist the sale of real estate of his deceased wife to pay debts, subject to his curtesy, on the ground that certain claims against the estate are invalid; his interest is not affected by their allowance or rejection. *Pirmann v. Gerhold*. 414

DAMAGES—

1. Where, by reason of a public nuisance, an individual sustains a special injury he may recover such special damages, whether direct or consequential. *McCormick Harvesting Co. v. Kauffman-Lattimer Co.* 468

2. An action against a street railway company for failure to properly transfer a passenger is one in which exemplary damages may be allowed. *Carr v. Toledo Traction Co.* 593

3. Damages for an attachment which is dissolved cannot be awarded unless it is shown that the attachment was a malicious prosecution. *Ault v. Jones*. 558

4. In an action for damages for malicious prosecution, the jury may assess as part of compensatory damages that which will compensate accused for injury done to character, reputation and credit by the prosecution. *Johnson v. McDaniel*. 717

5. Remuneration for mortification, humiliation and shame and anguish of mind suffered by reason of arrest and imprisonment may be included in compensatory damages. Ib.

6. When the accuser, in beginning and conducting the prosecution, was swayed by actual malice, in contradistinction from legal malice, the jury may give exemplary or positive damages. Ib.

7. In estimating exemplary damages the jury may consider the standing of the parties. Ib.

8. In estimating the damages in an action by the husband for the alienation of his wife's affection, the jury must regard the character of the injury, the alienation of the love and affection of the wife, her debauchment, if such took place, and give damages to compensate the husband for the loss of her love and society and also for all that he may feel from the nature of the injury. *Myers v. Raynolds*. 619

9. The jury has a right to give what is called exemplary or punitive damages in such sum as may be deemed a punishment for defendant's conduct, and which will be an example for the purpose of deterring others from like conduct. Ib.

10. In an action for having lived and cohabited in a state of adultery with plaintiff's wife, there is no fixed rule for determining the amount of damages to be allowed. Ib.

11. In an action for a tort wherein punitive damages were recoverable the judgment will not be reversed on the ground that evidence showing the pecuniary condition of the defendant was admitted. *Lamprecht v. Crane*. 753

DEATH BY NEGLIGENCE—

1. In arriving at the total amount of damages to be awarded under the statute, for wrongful death, the jury should consider the pecuniary injury to each separate beneficiary not found guilty of contributory negligence. *Altmeier v. Cin. St. Ry. Co.* 655

2. As to beneficiaries who may be found guilty of contributory negligence, no damages should be awarded on their account, and the jury should find in its verdict which of the beneficiaries were guilty of such contributory negligence. Ib.

DEEDS—

1. A deed not acknowledged is good as a contract. *Jay v. Squire*. 318

2. Parol evidence is not admissible to convert a deed based on no valuable consideration, or one merely nominal, into a deed for value, so as to defeat an existing attacking creditor or give such creditor a preference over him. *Stoltz v. Vanatta*. 34

3. A court of equity will not reform a deed on an allegation of mutual inadvertence of parties to the transaction, for purpose of making such preference. Ib.

4. Evidence to establish the existence of an alleged lost deed must be clear and convincing, and must produce in the minds of the court a conviction that a valid deed once existed. *Smith v. Neff*. 449

5. When tracts of land are sold, if a small strip remains, as where the purchaser of a building obtained title to a lot three feet shorter than the building itself, it becomes the property of the last buyer, unless specification is made to the contrary. *Chandler v. Lomady*. 539

6. In the case above fore-shadowed it was held that the building

Deposition—Ditches.

DEEDS—Continued—

should remain, the owner to have title to the three feet, but that title to land beyond the projection of the eaves did not pass. Ib.

DEPOSITIONS—

1. Under the laws of Ohio a United States consul is not authorized to act as a notary public in the taking of depositions. In re Herckelrath's estate. 565

2. Depositions taken before a United States consul in a foreign port are, therefore, inadmissible as evidence in the state courts. Ib.

DESCENTS—

In the distribution of property the strict rules of law should be moderated by the doctrines of equity, where a strict application of the former would work obvious injustice. In re account of Ellis, Adm. 330

DEVISE—

1. When, under a devise the legal title vests in the executor, a judgment against the devisee will not constitute a lien on the property devised. Barkman v. Hain. 474

2. A devise providing that the land shall be sold by the executor, gives to him a mere naked power. Ib.

3. Where the will provided that testator's real estate should be sold by the executor twelve years after testator's death, and proceeds divided between his children: Held, that the interest of the children vested at time of testator's death and was subject to a judgment lien, the same as any real estate, and the land being sold by the executor, the lien was transferred to the fund arising from such sale. Ib.

4. The probate court has jurisdiction in a cause of action brought by a legatee to compel the executor to show cause why the balance of the legacy should not be paid to such legatee. In re estate of Isherwood. 143

5. Legatees are entitled to demand payment of their legacies within the four years limited for presentation of claims of creditors, upon a satisfactory showing to the probate court and the giving of an undertaking to the executor, if any be required by the court. Ib.

DISORDERLY HOUSE—

1. Where defendant is charged with keeping a disorderly house or "a house where drunkards, tipplers, gamblers, vagrants, prostitutes or other idle or disorderly persons resort or congregate," no scienter need be alleged, as the specific charge of the

offense contains within its terms the knowledge of the purpose. Brown v. Toledo. 210

2. It is not necessary that a house occasion annoyance to neighbors or residents of the vicinity, or be a nuisance, in order to be unlawful, and no allegations of annoyance or disturbance are necessary in affidavit or indictment for keeping such house. Ib.

3. Names of those frequenting such house need not be given in such indictment or information, as character of house may be proven by general reputation. Ib.

DITCHES—

1. The construction of drains is an exercise of the police powers of the state, and the necessity for the same may be determined in such manner as the legislature may direct. Thomas v. Commissioners. 510

2. If a proposed ditch will in any reasonable degree contribute to the public health, convenience or welfare, it is "conducive to the public health;" it need not be absolutely necessary. Thomas v. Commissioners. 503

3. If the ditch as a whole is "conducive to the public health," it is immaterial that certain parts taken by themselves would not be so. Ib.

4. The fact that the ditch will enable the adjacent land owners to raise larger crops, is not enough to show that it is conducive to the public welfare. Ib.

5. The word "public," as used in connection with the words, "health, convenience or welfare," has reference to the people of the neighborhood. Ib.

6. The fact that the improvement could be accomplished by cleaning out old ditches, does not prevent the establishment of such new ditch. Ib.

7. Whether such proposed ditch is practicable, depends, not upon whether it is the best route, but that it is not an unreasonable one, in reference to the object sought. Ib.

8. The width of the land appropriated, and that for which compensation should be allowed, is that taken by the proposed ditch from the top of each side thereof. Ib.

6. The measure of compensation in such case should be the fair market value of the land taken, irrespective of any benefits conferred upon the owner by the construction of the ditch. Ib.

10. This market value is to be fixed at the time the property is ap-

Divorce and Alimony—Eminent Domain.

propriated, and will be held to be the selling value of such land. *Ib.*

11. The market value is not that realized upon a forced sale at a short notice, but the highest price which could be obtained after a reasonable time and notice, from those having the ability, occasion and desire to buy. *Ib.*

12. The damages to be awarded adjoining owners, consists of whatever actual injury, not remote or purely speculative, is caused to the lands by the proposed ditch. *Ib.*

13. The object of allowing the jury to view the premises is to allow them to apply their own judgment to the questions to be determined, as well as to better understand the evidence. *Ib.*

14. Section 4469, Rev. Stat., which provides that in ditch appeals, "it shall be necessary for only eight jurors to agree," to return a verdict, upon the first two propositions contained in this section, is not unconstitutional, as being in conflict with secs. 5 or 19 of art. 1, of the constitution. *Emig v. Commissioners.* 459

15. In ditch appeals, the jury is not, in addition to the four questions specifically submitted to them, as provided for in sec. 4469, Rev. Stat., required to find that the proposed ditch is necessary. *Ib.*

16. It is not the right to take the property for public use that is to be submitted to a jury, but it is the amount of compensation to which the owner is entitled, which the constitution requires a jury to determine. *Ib.*

17. If the jury find that the ditch is conducive to the public health, convenience or welfare, and the route is practicable and will be a public benefit and utility, it may justly be regarded as necessary. *Ib.*

18. The jury in their view of the proposed improvement are not required to traverse the exact line of the ditch, they are not required to see every foot of the proposed route, but all that is required is a substantial compliance with the law in regard to their view of the premises, as provided for in secs. 4467 and 4468. *Ib.*

DIVORCE AND ALIMONY—

1. Bargainings between husband and wife about alimony are not unlawful, but the rule is that all agreements of that character be laid before the judge. *Brown v. Brown.* 568

2. Where a decree is sought under sub-division 7 of sec. 5689, Rev. Stat., for "any gross neglect of duty," it is not necessary that the cause of

divorce should have continued for three years. *Morse v. Morse.* 544

3. The statutes do not authorize the seizing of the property of a non-resident husband to enforce the payment of alimony. *Miesse v. Miesse.* 561

4. A decree for alimony may be enforced by the husband, as heir of the divorced wife, against her first husband, after her death. *Sharp v. Sharp.* 562

DOWER—

1. A conveyance of an unassigned dower interest, for a valuable consideration, will be sustained in equity. *Bausch v. McConnell.* 162

2. Only those claiming through the mortgage instrument can defeat the wife's contingent right of dower in the lands of the husband which were mortgaged before her marriage. Therefore, as against a mere judgment creditor, she has a right of dower in the whole premises. *Sprague v. Law.* 384

3. Where wife of assignor joins in a mortgage, which, though unrecorded, is good between the parties, and upon distribution claims her inchoate right of dower, then assigning to one who has knowledge of the mortgage, in payment of a debt, she is entitled to dower, but it must be subrogated to the mortgage so far as necessary to satisfy the claim. *In re Dower.* 560

EMINENT DOMAIN—

1. The power of eminent domain is not conferred by the constitution. *Emig v. Commissioners.* 459

2. The power is an inseparable incident to sovereignty, and its exercise is conferred for the accomplishment of lawful objects, upon the general assembly. *Ib.*

3. This body may exercise the right directly, or they may delegate it to another. *Ib.*

4. The only thing that the judiciary can do is to see that the power is not abused, and that proper compensation be awarded the owner. *Ib.*

5. To effect the drainage of malarial lands and make them fit for habitation and use, is a purpose sufficiently public to justify the exercise of the right of eminent domain. *Thomas v. Commissioners.* 503

6. When a municipal corporation has passed an ordinance appropriating property to its own use, compensation therefor, and decrease of value of remainder, if any, should be made as of date of passage of ordinance. *Toledo v. Bayer.* 8;

Eminent Domain.

EMINENT DOMAIN—Continued—

7. Subsequent improvement of property by owner after passage of such ordinance is at his own risk. *Ib.*
8. When property is condemned by a corporation the compensation allowed should be the market value at the date of the appropriation. *Railroad Co. v. Snyder.* 480
9. The market value is the price which the article will bring when offered for sale in the market, being the highest price which those having the occasion and ability to buy are willing to pay. *Ib.*
10. The fact that owner's financial situation is such that a fair sale would be of great benefit to him, or that plaintiff is so situated that it must have this property, should not be considered. *Ib.*
11. The market value is to be ascertained from sales of similar property in the same tract or of property having substantially the same surroundings and conditions, upon which the opinion of witnesses must be based. *Ib.*
12. Where land because of its awkward shape and surroundings has no actual market value, considered as a separate and independent tract, the value will be considered the same as an equal area of the adjoining land. *Ib.*
13. Only lands can be considered as remaining lands to which damage may be allowed, which adjoin and in their use and enjoyment are connected with the lands sought to be appropriated. *Ib.*
14. Whatever of actual and not remote and speculative injury is caused by the building and operation of a railway through defendants' lands, to them as owners of such lands and not in common with the public at large, should be considered in estimating how much less valuable the remaining portions of their lands will be. *Ib.*
15. The provisions of the statutes by which the railroad company is obliged to maintain crossings, fences, drains, etc., for the benefit of the owner, are to be considered. *Ib.*
16. If a railroad violates any duty to adjoining landowners or increases burdens by using lands for a different purpose than that for which they were appropriated, the law provides a remedy in damages, and such violations of duty are not to be anticipated. *Ib.*
17. Compensation means the sum of money which will compensate the owner for the land actually taken or appropriated. *Ib.*
18. "Damages" is an allowance made for any injury which may result to the remaining land, by reason of the construction of the proposed railroad after making all due allowance for benefits. *Ib.*
19. Any local benefit arising from the construction of the railroad which is connected or blended with any damages caused to the lands, may be considered to reduce the damage connected with it. *Ib.*
20. Damages arising from furnishing tramps access to lands of defendant through the right of way are too speculative. *Ib.*
21. What use lands are now put to and what use they might be put to at the present time are to be considered, but not what use they may be put to in the future because of the increased facilities for travel or transportation or the growth of towns. *Ib.*
22. Where the highway is taken for a railroad the abutting owners are entitled to damages for inconveniences which result to them in the use of their lands, but not for such inconveniences as are suffered by the traveling public in general. *Ib.*
23. If, excluding inconvenience to defendants suffered by public at large, the benefits derived from the building of the railway will outweigh the detriments so that the market value of the land is not diminished, they are entitled to no compensation for damages to the remaining land, but only for land actually taken. *Ib.*
24. The burden of proof in appropriation cases is upon defendant to prove the injury for which he asks damages, by a fair preponderance of the evidence. *Ib.*
25. In arriving at a decision the jury should consider not only the evidence in the case but also their knowledge gained by experience and a view of the premises. *Ib.*
26. A railroad company, having obtained a verdict fixing the compensation for land to be taken, after waiting six months and failing to take advantage of such verdict, is not barred from suing again to condemn the same property. *Railroad Co. v. Blank.* 569
27. In that event, however, the company should make the property owner whole, as regards the expenses of the former trial, and place him in the same position he was in when the suit was first begun. *Ib.*
28. In a common law action, the impaneling of the jury is a part of the trial of a cause, but condemnation proceedings are special proceed-

Equity—Estoppel.

ings, and not common law actions, and are entirely governed by the statute creating them. *Railroad Co. v. Kloeh.* 217

29. In an action by a railroad company to condemn and appropriate to its use five separate parcels of land belonging to as many different persons, all the defendants are jointly entitled to but two peremptory challenges, and no more. *Ib.*

30. The right of peremptory challenges in condemnation proceedings is one of privilege, and not one of right. *Ib.*

31. The passage and publication of an ordinance to widen and extend a certain street and condemn and appropriate for that purpose certain described real estate, does not constitute an appropriation to public use, until statutory provisions have been strictly complied with and proceedings had in court. *Garvin v. Columbus.* 333

32. Where a city has taxed, for street improvements, the property within its limits, and afterwards commences condemnation proceedings to obtain possession of it, such proceedings give no rights to individuals who may be notified to pay taxes or assessments, or who may be brought into court upon condemnation proceedings. *Myers v. Toledo.* 148

33. A resolution by the municipal council as provided in sec. 2235, Rev. Stat., for appropriation of private property for any of the public purposes provided for in sec. 2232, Rev. Stat., and appropriation proceedings in pursuance of such resolutions had in probate court, do not deprive the owner of his property without an opportunity of being heard as to whether or not it is subject to appropriation. *Railroad Co. v. Toledo.* 306

34. The resolution of such council to appropriate certain land does not preclude the probate court from determining jurisdictional questions the same as provided for in sec. 6420, Rev. Stat., where the appropriation is petitioned for by a private corporation. *Ib.*

35. The words "owner or owners" as used in sec. 6448, Rev. Stat., if unlimited, might possibly include the owner of an equitable as well as a legal title. *Rapp v. Railroad Co.* 453

36. In a proceeding under sec. 6448, Rev. Stat., to compel a corporation to appropriate certain lands upon which it has entered, the person seeking to compel such corporation to condemn such property must be the owner of the legal title. *Ib.*

37. Where the owner of lands conveys them through a trustee to his wife, to be reconveyed to him at some future time, and afterwards, on failure or refusal of such person to reconvey, such owner accepts for his interest therein a certain sum of money; such owner has no interest, either legal or equitable, in such land that can bring him within the meaning or use of the term "owner of land," and, therefore, he can not maintain an action as provided for in sec. 6448, Rev. Stat. *Ib.*

EQUITY—

A court of equity will not reform an ineffectual voluntary conveyance so as to give one creditor preference over another creditor where their equities are equal. *Stoltz v. Vanatta.* 34

ERROR—

1. A final judgment in the circuit court is not vacated or rendered less a final judgment by the institution and pendency of proceedings in error in the Supreme Court. *Swan v. Railroad Co.* 297

2. The act amending secs. 595, 6560 and 6565, Rev. Stat., 90 O. L., 358, does not amend sec. 6723, Rev. Stat., or limit to ten days the six months' time therein provided for beginning proceedings in error to vacate a final judgment. *Hern v. Bevington.* 560

3. The amendatory act appears to make it the duty of the justice to certify his proceedings to the clerk of the common pleas court within ten days. *Ib.*

4. An order of the probate court removing an assignee of an insolvent debtor, is not a final order, from which error can be prosecuted by such assignee. *In re Jones.* 233

5. Whatever mistakes or errors may have occurred in a partition proceeding, it is for the party aggrieved in that proceeding to prosecute his suit in error, and not wait and attack it collaterally in some other proceeding brought to set aside the original partition. *Glemser v. Glemser.* 287

ESTOPPEL—

1. The term "estoppel" is no synonym for "assent." To work an estoppel it must appear that the one urging it will be injured by allowing the party against whom the estoppel is urged to deny any possible construction to be put upon his prior act or conduct. *Bank v. Guckenberger.* 438

2. A decree in a suit brought by the trustee of a mortgage for the foreclosure of that mortgage, does not

Evidence.

ESTOPPEL—Continued—

estop the same person suing as a stockholder. *Henry v. Railroad Co.* 41

3. The acceptance by a joint owner, of money paid into probate court, for property appropriated for a public street, does not estop his co-tenant from questioning the validity of the appropriation proceedings, as a part owner cannot by grant or estoppel create an easement in land against his co-tenant. *Garvin v. Columbus.* 333

4. A mortgagee, before condition broken, is an owner within the meaning of sec. 2237, Rev. Stat., which requires notice "to all the owners of the property sought to be appropriated," etc. *Ib.*

EVIDENCE—

1. In an action to recover money paid to county treasurer as an assessment upon the business of trafficking in intoxicating liquors under the Dow law, the tax duplicate is prima facie evidence of every fact necessary to authorize the assessment. *Stevenson v. Hunter.* 27

2. In a prosecution, under sec. 6921, Rev. Stat., for the pollution of a stream, each party is entitled to offer the best available proof of the condition of the water. *Burch v. State.* 137

3. The burden of proof in appropriation proceedings is upon defendant to prove the injury for which he asks damages, by a fair preponderance of the evidence. *Railroad Co. v. Snyder.* 480

4. The rule in criminal cases applicable to trials in courts, requiring the evidence to be strong enough to establish guilt beyond a reasonable doubt, has no application to the conclusions of grand jurors. *In re Commissioners.* 691

5. Evidence to establish the existence of an alleged lost deed must be clear and convincing, and must produce in the minds of the court a conviction that a valid deed once existed. *Smith v. Neff.* 449

6. Conviction means a mind free from doubt. *Ib.*

7. Stronger proof than the unsupported evidence of one person should be required to establish the existence of an instrument conveying real estate. *Ib.*

8. Declarations of a testator are admissible to rebut the presumption of the revocation or destruction of a lost will. *In re Blymeyer's will.* 399

9. Any declaration or statement of the accused in a criminal case

which is admitted in evidence should be carefully scrutinized, lest the language of the witness be substituted for that of accused, and for the further reason that they may have been imperfectly heard, defectively remembered or inaccurately related by the witness detailing the same. *State v. Snell.* 670

10. Silence under an imputation cannot be considered as an admission of the truth of the charge unless the circumstances are such that a denial would naturally be expected, or an explanation would naturally be called for. *State v. Iden.* 627

11. A petition in a civil action is competent evidence in the prosecution of one of the parties for murder, to show that such an action was pending at the time of the commission of the crime and to show the grounds for the action as stated in the petition, but should not be considered as any evidence of the truth of the statement it contains. *State v. Snell.* 670

12. Instruments in writing, letters and telegrams are also competent, but only as tending to throw light on the conduct and as bearing upon the guilt or innocence of accused. *Ib.*

13. Parol evidence is not admissible to convert a deed, based on no valuable consideration, or one merely nominal, into a deed for value, so as to defeat an existing attacking creditor or give such creditor a preference over him. *Stoltz v. Vanatta.* 34

14. In an action for damages for an assault with intent to commit a rape, evidence that the accused is reputed as a peaceable and quiet citizen is not admissible. *Ryan v. State.* 165

15. A reasonable doubt exists, if the material facts, without which guilt cannot be established, may fairly be reconciled with innocence. *State v. Bennett.* 339

16. Direct testimony is the positive statement, under oath, of a fact by a credible eye-witness. *Ib.*

17. Circumstantial evidence is the positive proof of circumstances which necessarily or usually attend such facts. *Ib.*

18. To convict in a criminal case, upon circumstantial evidence, each of the several circumstances relied upon to prove any essential element of the crime must be given by direct testimony, beyond a reasonable doubt. *Ib.*

19. Evidence of good character is admissible, not only to aid in determining whether defendant is guilty, but also of what grade, where the of-

Excavations—Executors and Administrators.

fense charged consists of several grades. Ib.

20. The opinions of experts as to the mental condition of accused, based solely upon facts assumed in hypothetical questions, are accorded greater or less weight according as the facts so assumed may or may not have been established by the evidence. State v. Miller. 703

21. The jury should not take for granted that statements of facts contained in hypothetical questions to expert witnesses are true; but should carefully determine from the evidence, which, if any, are true. Ib.

22. Such opinions as are based wholly upon a fair statement of all facts established by the evidence are entitled to much weight from the jury. Ib.

23. Non expert witnesses called upon to give their opinions as to the sanity or insanity of accused, are required to state facts upon which such conclusions are based. Ib.

24. The jury will be justified and required to consider a reasonable doubt as existing if the material facts, without which guilt cannot be established, may be fairly reconciled with innocence. State v. Snell. 670

25. But when a full and candid consideration of the evidence produces a conviction of guilt, and satisfies the mind to a reasonable certainty, a captious or ingenious artificial doubt is of no avail. Ib.

26. Circumstantial evidence is admissible under our laws to prove the guilt of accused, but it can only be conclusive where every necessary link in the chain of circumstances is proved beyond the existence of a reasonable doubt. Ib.

27. Testimony tending to show the physical and mental condition of accused, during the period when the conspiracy to commit a crime is alleged to have existed, is admissible only as tending to establish insanity, and where accused makes no such defense, and does not claim to have been unable to distinguish between right and wrong, such testimony should be ignored. Ib.

EXCAVATIONS—

Where building lots extend from a higher to a lower street, the depth to which the owner may excavate his lot, under the statute, without being liable for damage to his neighbor, if free from negligence, is determined by a slanting line from the curb of the higher to the curb of the lower street. Elshoff v. Deremo. 119

EXECUTIONS—

1. The wages, compensation or salary of a superintendent of a county infirmary, he being the head of a family, are "personal earnings," and are, therefore, exempt under sec. 5430, Rev. Stat. Backett v. Wishon. 257

2. A watch and chain of moderate value, owned and habitually worn by the debtor, are exempt as "wearing apparel," under the provisions of this section. Ib.

3. A divorced man is a "widower" within the true spirit and meaning of secs. 5435 and 5441, Rev. Stat., and is entitled to the exemptions therein provided for. Kunkle v. Reeser. 422

EXECUTORS AND ADMINISTRATORS—

1. Under sec. 5995, Rev. Stat., where a will is duly proved, it is mandatory upon the court to appoint the person therein named as executor, if he is legally competent, and offers proper bond if required. In re Sultzback. 516

2. A person named in a will to act as executor, who is not a minor, a lunatic or an idiot, upon tendering a proper bond must be appointed as such executor. Ib.

3. The fact that the person named as executor is antagonistic to a large number of the legatees, and that his interests are antagonistic to theirs, does not afford the court sufficient reasons for refusing to make such appointment. Ib.

4. A person entitled under the statute to the administration of an estate will not be appointed, where it appears that he has an interest or claim in the estate antagonistic to that of the devisees or legatees under the will, and it seems probable, that if appointed, litigation would ensue which would decrease the shares of such legatees or devisees. In re Brennan. 499

5. The one entitled to such appointment under the order provided in the statute need not be either mentally or morally incompetent to justify the court in refusing to appoint him, where it appears that such appointment would be detrimental to the estate. Ib.

6. An administrator ought in all instances to be one in whom all parties in interest have complete confidence, and whom they can approach at all times, without embarrassment, to confer and consult in reference to the management of the trust, and if the

Executors and Administrators.

EXECUTORS AND ADMINISTRATORS—Continued—

next of kin is not such a one, the court will, in its discretion, appoint another. *Ib.*

7. Section 6088, Rev. Stat., requiring publication of notice of appointment of an executor, is not complied with by a publication of such notice in a German newspaper of general circulation. The publication must be made in an English newspaper. *In re Ringwald.* 452

8. Where an executor has borrowed money and used it to pay a debt of the testator, and such executor has filed his final account and the same has been approved; and afterwards the administrator of the devisee of such testator has obtained leave to sell the lands devised, and the same have been sold and proceeds paid into court: Held, that the creditor of such executor cannot intervene and have his claim against such executor paid out of proceeds of this sale. *Smith v. Hayward.* 462

9. An executor or administrator has no authority to borrow money to pay debts of the estate, and the debt therefore, at the time of its creation, could be none other than the individual debt of the executor or administrator. *Ib.*

10. Such a debt cannot, therefore, constitute a lien on the premises, until so decreed by a court of equity. *Quære*, whether such a decree could be obtained. *Ib.*

11. Where one is under no obligation to pay the debt of another, payment of such debt does not subrogate him to the rights of the creditor. *Ib.*

12. Where an executor does not choose to reimburse himself for debts due him from the estate, *quære*, whether an individual creditor of such executor, in an action in the probate court, could compel him to do so; such action should be sought in a court of general equity jurisdiction. *Ib.*

13. When a final account has been filed and approved, it cannot be attacked in a collateral proceeding; as probate courts, being courts of record in the fullest sense, their records import absolute verity. *Ib.*

14. By the approval of the final account of the executor—a finding that the estate has been fully settled—title passes free and clear to the devisees. *Ib.*

15. An administrator of the assignee of a perpetual lease is not personally liable to the owner of the fee for the payment of rents and taxes

which were covenanted for in the lease. *Gansen v. Moormann.* 287

16. The obligation of the executor of the estate of a deceased partner is to respond to the fair purchase price of the assets, owing to maladministration—fraud—in not obtaining it. *Jones v. Proctor.* 416

17. The right against the executors arising not out of what they have received, but out of collusion in a fraudulent appraisement, and not having received any trust funds, they are not liable to an accounting. *Ib.*

18. The remedy, if the appraisement was fraudulent, is either a reappraisement, if such can be had, or the ascertainment of the proper sum by a judicial tribunal. *Ib.*

19. Under sec. 6191, Rev. Stat., an administrator is charged with interest on balance of funds remaining in his hands after filing his final account. *In re Thornton.* 151

20. The word "may" as used in this section, means *must*, and imposes upon the administrator the duty of investing such funds. *Ib.*

21. A creditor of an insolvent estate being entitled to the whole of a certain fund, which the administrator refuses to pay, is entitled to interest on such sum which has accrued thereon, pending litigation concerning its payment between the administrator and such creditor. *In re Robb.* 227

22. Funds of an insolvent estate in the hands of an administrator are subject to taxation. *Ib.*

23. A debt owing to the estate by the distributee is an asset of the estate and the same should be charged to the distributee and retained by the administrator out of the share of such distributee. *In re account of Ellis, admr.* 330

24. Where the testator became surety for a distributee on a promissory note, and judgment was recovered on the note against both principal and surety, and both are dead without execution having issued on the judgment, the amount of such judgment may be retained by the administrator out of the share of the distributee, as well as amount of a note given by distributee to the testator. *Ib.*

25. An heir entitled to a share in the distribution of an ancestor's estate, may have, in proper proceedings, a personal judgment, for the amount of his share, upon default of administrator to comply with the court's order of distribution. *Dahme v. Mehner.* 107

Executors and Administrators.

26. If the heir be of age and competent to sue in his own behalf, his right of action will be barred by statute of limitations six years from date of such administrator's default.

Ib.

27. The usual relations and duties existing between such defaulting administrator and the heir, do not give rise to a continuing and subsisting trust.

Ib.

28. If by deceit or fraud the heir is induced to agree to surrender any rights against the administrator, such heir must bring his action to set aside such agreement within four years after a discovery of such fraud.

Ib.

29. Claims of administrators for moneys paid for taxes and repairs of real estate of intestate, and for labor in gathering crops after his death, are valid debts of the estate, and they are entitled to a credit therefor. In re Turpin's estate.

410

30. A claim for money deposited with intestate for safe keeping in his life time, held under the circumstances of the case a valid debt of the estate.

Ib.

31. An administrator is entitled to his statutory commissions upon certificates of stock which came into his hands as assets of the estate, remained there until final distribution, and were turned over by him to the widow as sole legatee. In re Duddy's estate.

412

32. The risk and care attendant upon the custody of such certificates cannot be considered as "extraordinary services" within the meaning of the statute, and allowed for as such.

Ib.

33. Where an administrator has charged the statutory allowance of six per cent. on the first thousand dollars collected by him, and four per cent. on the next four thousand; an administrator *de bonis non*, who succeeds him, can only charge the percentage his predecessors could have charged upon money subsequently collected, viz., two per cent. In re Waring's estate.

415

34. The executors of a will were given full power to manage the estate. An agreement was entered into between the executors, legatees and creditors, by which, among other stipulations, certain property was to be turned over to a creditor. This agreement was held valid by the Kentucky courts, and under it the executors borrowed money to pay creditors, and all outstanding debts have been paid. The above creditor alone now objects to the settlement on the ground that

under it no merchantable title could be given him until a final settlement, and that the executors had no power under the will to enter into this agreement: Held, that the creditor cannot now object to the agreement. In re Worthington's estate.

524

35. The policy of the law favors settlements, in order that there may be a speedy adjustment of legal controversies, and the courts have adopted that plan as a desirable conclusion in the settlement of estates. Ib.

36. The widow and minor children not being required to make a demand to secure a year's allowance, mere lapse of time will not be considered as a waiver or relinquishment of such right. In re Rierdon's estate.

606

37. A widow does not waive her claim to a year's allowance by electing to take under her husband's will, although such will directs that there shall be no appraisement, and an appraisement is necessary to such allowance.

Ib.

38. A widow does not, by electing to take under her husband's will, which gives her a life estate in the realty and all the personalty, forfeit her claim to a year's allowance, under sec. 5964, Rev. Stat.

Ib.

39. Where no appraisement of an estate has been made, and thereby no year's allowance set off to the widow and her minor children, on her application such appraisement will be ordered at any time while said estate remains unsettled.

Ib.

40. If any portion of said estate has been used by the widow for her support, the same should, under sec. 6040, Rev. Stat., be taken into consideration by the appraisers in making such allowance.

Ib.

41. In fixing a widow's one year's allowance after expiration of twenty years the circumstances of the parties at time of husband's death should govern the amount. In re Howland's estate.

582

42. An action can be maintained by an executor under sec. 6202, Rev. Stat., to obtain the judgment of the court as to the true construction of a will, only in cases where a trust is involved or where the executor has duties to perform, in carrying out the provisions of the will, which require the guidance or direction of the court. Chase v. Isherwood.

1

43. An action to obtain such construction will be dismissed for want of jurisdiction, when such will relates to real estate over which the executor had no concern.

Ib.

Extradition—Grand Jury.

EXECUTORS AND ADMINISTRATORS—Continued—

44. Where an administrator, having knowledge of a valid claim against an estate, and having funds in his hands to pay it, pays all other claims in full, and without regard to their preference, thereby exhausting the funds in his hands, he is personally liable to the creditor for the full amount of his claim. *In re Wakefield.* 395

EXTRADITION—

1. In extradition of a fugitive from justice, the guilt or innocence of the prisoner is not the question; under the constitution the question simply is that the prisoner be duly charged with crime in the demanding state. *Ex parte Larney.* 541

2. On habeas corpus, therefore, proof of an alibi is not admissible, but proof that the prisoner, while he committed the crime, was not actually but only constructively in the demanding state is admissible. *Ib.*

FALSE IMPRISONMENT—

A pure, naked, unlawful detention, unaffected by any question of motive or purpose, constitutes false imprisonment. *Johnson v. McDaniel.* 717

FINES—

1. Where a fine is imposed and the prisoner is taken to prison, the sentence is then in execution and the police judge has no legal right to bring the prisoner back into court and impose a heavier fine on the same charge. *In re Habeas Corpus.* 571

2. That portion of sec. 1862, Rev. Stat., which provides that a fine of \$50 shall not be deemed unreasonable, but where in any by-law a greater fine or penalty is imposed, it shall be lawful for the court or magistrate to reduce the same to such amount as may be deemed reasonable and proper, does not make an ordinance illegal which allows a fine of \$100; and a fine of \$50 under such ordinance cannot be declared unreasonable. *Brown v. Toledo.* 210

FIXTURES—

1. A horizontal boiler and an engine in a building for the purpose of supplying power to the machinery are fixtures. *Baker v. Brick Co.* 511

2. An upright boiler standing on a brick foundation and used to spray oil on brick kilns is not a fixture. *Ib.*

FORCIBLE ENTRY AND DETAINER.

Section 7607, Rev. Stat., construed with secs. 6608 and 6547, does not, in forcible entry and detainer, limit the right of trial by jury to a demand either on return or appearance day. *Miller v. Schmidt.* 4

FRAUD—

1. Fraud in the sale of property defined. *Spencer v. King.* 113

2. The opinion as to value of land expressed by seller to induce purchaser to buy is not a fraud, if it was only an opinion, and was honestly given, although untrue. *Ib.*

3. The law does not exact any greater degree of honesty and good faith from a minister of the gospel who sells property than it does from a layman. *Ib.*

GAME LAWS—

1. The fish law as amended, 92 O. L., 332, does not prohibit the shooting of fish. *State v. Moder.* 564

2. The portion of sec. 409, Rev. Stat., which provides for the appointment of a fish and game warden for each county is in contravention of art. 10, secs. 1 and 2 of the constitution, in seeking to create a county office and provide for the filling of that office by appointment, and is to that extent void. *State v. Lewis.* 371

3. The provision in sec. 6966-2, Rev. Stat., that the costs of prosecuting violations of the fish and game laws shall be paid from the county treasury, is an exception to sec. 7136, Rev. Stat., which gives a magistrate authority to require complainant in misdemeanor cases, when a private citizen, to secure costs, and where there has been a prosecution, costs must be paid as provided. *Ib.*

GOOD WILL—

1. The manner of conducting the business, the attention paid to it by the partners, the courteous way in which they treated their customers, the creating the knowledge in the trade that they kept the best class of goods, etc., constitute the good will of a partnership business and may be so classed and valued by appraisers in the court of insolvency. *In re Good Will.* 572

2. But the value of such good will must be a separate one. It must be an asset of itself, separate from other portions of the business. *Ib.*

GRAND JURY—

1. A grand jury cannot find an indictment, unless the evidence before them, unexplained and uncontra-

Guardian and Ward—Homestead.

dicted, would authorize a conviction by a petit jury. *In re Commissioners.* 691

2. In determining that question grand jurors have no right to assume that there will be evidence on the trial to either explain away or contradict the inculpatory evidence before them. *Ib.*

3. A special grand jury assembled to consider one case is not thereby prevented from investigating any matter which involves a violation of the criminal law of the state. *Ib.*

4. The fact that the foreman of a grand jury signed his name to the indictment in the wrong place, so that he appeared as clerk rather than foreman, is not sufficient ground upon which to quash an indictment. *State v. Lewis.* 552

GUARDIAN AND WARD—

1. Section 6255, Rev. Stat., limits the power of appointing a guardian to cases where the minor has no parents, or where both are unsuitable, and in proceedings to appoint a guardian such qualifications must be shown, and the parent given an opportunity to defend, by being made a party. *Boescher v. Boescher.* 184

2. Where the testator owned stock in a bank, such bank has no authority to issue the stock to the guardian of testator's minor children, as such stock could only be lawfully issued to the administrator; and, therefore, stock issued to such guardian in return for stock owned by the estate will be set aside. *Bank v. Bank.* 150

3. A mother gave to her minor children a certain sum of money to be held by their guardian as such until they attained majority; and thereafter as trustee until final distribution; said "guardian and trustee" to pay to her the interest on the money until the youngest child should attain majority, after which he should pay over the money to each of the children: Held, that the guardian received the money as guardian and must account for it as such. *In re Kaufman's estate.* 407

HABEAS CORPUS—

A person committed to jail by an examining magistrate is entitled to his discharge on habeas corpus where the next regular grand jury, after his commitment, did not return an indictment against him, unless the same was omitted for some cause mentioned in sec. 7211. *State v. Lott.* 600

HABITUAL CRIMINAL LAW—

A pardon obliterates the record of the conviction, so far as the operation of the habitual criminal law is concerned. *State v. Williams.* 545
Accord, *State v. Anderson.* 548

HOMICIDE—

1. A reasonable doubt exists, if the material facts, without which guilt cannot be established, may fairly be reconciled with innocence. *State v. Bennett.* 339

2. The person killed need not be especially in the mind of accused while he is forming his purpose to kill and deliberating and premeditating upon the killing. *State v. Miller.* 703

3. It is sufficient if the one killed is one of a class deliberated and premeditated upon, against which the design and purpose to kill is directed. *Ib.*

4. Circumstances under which a homicide would be justifiable. *Ib.*

5. Circumstances under which one charged with murder would be guilty of manslaughter only. *Ib.*

6. Malice may be shown by previous threats and conduct of the party, as well as the weapon used and the injury inflicted; and must include and be considered in connection with the surroundings, having reference to both parties. *State v. Pate.* 732

7. Although the jury may be satisfied from the evidence that the accused in the afternoon, in conversation with a neighbor, appeared violent and threatened violence to the officers and the whole community and afterwards, in an orderly, quiet and peaceable manner, transacted business and settled accounts with his neighbor and that in the evening, when the officers came to his house, he could have killed them but did not attempt or threaten to do so, but sat down and talked in a quiet and peaceable manner, then the jury may believe him to have abandoned a purpose which he may have had or formed in the afternoon. *State v. Miller.* 703

HOMESTEAD—

1. If the property of the assignor consists either of personal property or real estate not occupied as a homestead, or real estate occupied as a homestead, but not incumbered by lien, so as to preclude the allowance of a homestead therein; the right of the assignor to his exemptions rests upon the facts existing at the time of the assignment, and the fact that the assignor was a "widower living with an unmarried minor son," at the time of

Husband and Wife—Injunction.

HOMESTEAD—Continued—

the assignment, but has since remarried, will not destroy his right. *Kunkle v. Reser.* 422

2. If the property of the assignor consists of real estate charged with liens, some of which preclude the allowance of a homestead while others do not, the right of the assignor to his exemptions rests upon the facts existing at the time the fund is finally disposed of. *Ib.*

HUSBAND AND WIFE—

1. Bargainings between husband and wife about alimony are not unlawful, but the rule is that all agreements of that character should be laid before the judge. *Brown v. Brown.* 568

2. A divorced wife is entitled to proceeds of a policy of insurance, she having been named as beneficiary and subsequently divorced. *In re Insurance Policy.* 561

3. Service upon a wife, who does not live with her husband, is not obtained by leaving summons at the residence of the husband. *Ault v. Jones.* 558

4. Where a husband knowingly, although only passively, suffers, permits or connives at the improper advances, attentions and presents from another man to his wife, and at their improper relations, he cannot recover for alienation of his wife's affections. *Myers v. Reynolds.* 619

5. In this connection the jury may take into consideration the extent to which the husband had knowledge of what took place between his wife and defendant. *Ib.*

6. In determining whether the husband has, from time of his marriage until separation of his wife from him, lived a chaste, virtuous life himself, and in all respects treated his wife as an affectionate husband should, the jury may take into consideration the situation and circumstances in life of the parties, the family, the surroundings and the home. *Ib.*

7. Rights of a married woman as member of a co-partnership. *Raymond v. Breckenridge.* 156

8. Under an agreement of separation in which both father and mother reserve to themselves all rights and privileges as parents, with provision that children are to have a present home with a third party, are never to be permitted to have a home with a step-parent, and the mother agreeing not to remove them from custody of the third person without consent of the father, the latter has the right to remove the children from such

custody at any time without consent of the mother or such third person. *Quigley v. Murphy.* 680

INDICTMENTS—

1. The fact that the foreman of a grand jury signed his name to the indictment in the wrong place, so that he appeared as clerk rather than foreman, is not sufficient ground upon which to quash an indictment. *State v. Lewis.* 552

2. In order to show that different indictments are for the same offense, it is necessary to attack the proceedings by a plea in bar. *Ib.*

3. A grand jury cannot find an indictment unless the evidence before them, unexplained and uncontradicted, would authorize a conviction by a petit jury. *In re Commissioners.* 691

4. The word "pending" in an indictment for bribery in connection with a bill pending in the legislature, is sufficient to convey the proper meaning of the charge without stating whether the bill is pending in the senate or in the house. *State v. Gear.* 569

5. An indictment alleging that accused offered or promised money with and for the purpose of influencing M with respect to his official duty is comprehensive enough to embrace any of the duties of the clerk of the house of representatives, and under this general charge the intention is sufficiently proved. *State v. Iden.* 627

INFORMATION—

An information for practicing a trick game in obtaining money, which fails to specify the kind of a trick game practiced, is defective. *In re Trick Game.* 572

INJUNCTION—

1. An injunction should not be allowed to enforce a contract of employment, which by its terms is oppressive and unjust. *Oil Co. v. Familion.* 219

2. An injunction cannot be granted to restrain a threatened libel. The proper remedy is to wait until the libel occurs and bring suit for damages. *Columbus Grocery Co. v. Wholesale Grocers' Assn.* 582

3. Before an individual can maintain an action, either for damages or for an injunction, because of the obstruction of a highway, he must prove some damages peculiar to himself and not suffer in common with the general public. *McCormick Harvesting Co. v. Kauffman-Lattimer Co.* 468

Innkeeper—Insanity.

4. The fact that the extent and amount of injury, or damage, is not susceptible of proof, affords a reason in addition to others for granting to plaintiff equitable relief. Ib.

5. One suspended from membership in a chamber of commerce until he submits to a public reprimand as a punishment for unmercantile conduct is not threatened with irreparable injury without adequate remedy at law nor entitled to an injunction against such chamber. *Bishop v. Chamber of Commerce.* 356

6. In the absence of fraud or conspiracy, courts will not supervise or interfere with the action of such board in the trial of a member charged with unmercantile conduct. Ib.

7. The probate court will not enjoin the distribution of an estate at the suit of successor in title to the property, on the ground that the latter, holding a bond by which title is guaranteed, has a claim against the estate not yet due, but which will arise if title proves defective. *Bates' estate.* 545

8. Where plaintiff, by virtue of a contract with defendant, had established a boat livery which was to continue in the future, unless defendant exercised an option to buy out plaintiff, which defendant had not done, but was threatening to lease to other parties and remove plaintiff's boats. The plaintiff in his petition set up these facts and prayed for specific performance by defendant; the court granted a temporary injunction. On motion to dissolve: Held, that this is an action for specific performance, which consists in defendant's refraining from doing the acts threatened, and, therefore, the relief prayed for is obtained by the injunction. *Hepburn v. Voute.* 311

9. Where the compensation and benefits to be received by plaintiff in the future were entirely dependent upon future earnings, there being no adequate remedy at law and there being no method of arriving at the damages to be recovered, the injunction will not be dissolved. Ib.

10. In determining whether a preliminary injunction should be allowed, the court may consider the comparative inconvenience to result from his decision, and need not anticipate the ultimate rights of the parties. Ib.

11. Where defendant has shown no equity in his favor, and it appears that plaintiff would be left practically without a remedy if the temporary injunction was dissolved; it will be

continued until a hearing on the merits of case can be had. Ib.

INNKEEPER—

The keeper of a saloon or road-house is not an innkeeper in the sense which would make him responsible for a horse and buggy hitched in front of his place by a customer. *Pabe v. Myers.* 578.

INSANITY—

1. Trial to determine the sanity of a person under indictment in the court. If the testimony shows that accused is probably not sane, he is entitled to a verdict finding that he is not sane. *State v. Tyler.* 588

2. A man may be insane according to medical science and yet responsible for his acts in law. Ib.

3. A weakness of mind which falls short of that nature and degree of mental freedom which render a person incapable of distinguishing between right and wrong, would be insufficient to justify a verdict of insanity. Ib.

4. Insanity is a proper and legitimate defense in criminal prosecutions, and will excuse the commission of a criminal act when made to appear affirmatively that the person committing the act was at the time insane, and that the act was the direct consequence of his insanity. *State v. Miller.* 703

5. The law recognizes partial as well as general insanity: That a person may be insane upon one or more subjects and sane as to all others. Ib.

6. As regards the guilt or innocence of accused, it makes no difference whether the act charged was produced by general insanity or by an insane delusion regarding some particular person or subject. Ib.

7. While the defense of insanity is to be regarded as not less full and complete than a humane defense, the jury should be equally careful that they do not suffer mere theories or opinions, not well sustained by reasons and facts, to furnish protection to guilt. Ib.

8. The law presumes every person who has reached the age of discretion to be of sufficient mental capacity to form the criminal purpose, and to deliberate and premeditate upon acts which malice or other evil disposition might impel him to perpetrate. Ib.

9. To defeat the presumption which thus meets the defense of insanity, the mental alienation relied upon must be affirmatively established by the defense. Ib.

Insolvent Estates—Interest and Usury.

INSANITY—Continued—

10. Where it appears that the accused at the time of the shooting, and for some weeks or months before, was laboring under delusions, which so far dominated his mind and actions that he acted on them and was controlled by them, and the act he did was to any appreciable or considerable degree the product of them, he is not responsible for it. *Ib.*

11. The law provides that there may be a trial in common pleas to inquire into the sanity of a person under indictment and his capacity to present facts to his counsel for defense, in advance of the trial which shall determine whether or not he be guilty under the indictment. *State v. O'Grady.* 654

12. Such trial has nothing to do with the prisoner's condition at the time when he is alleged to have committed the crime, except in so far as that mental condition may aid the court in the determination of his present condition. *Ib.*

13. In such proceeding a unanimous verdict is not necessary. If three-fourths or more of the jury find the prisoner insane this will authorize the jury to sign a verdict to that effect. *Ib.*

14. A person indicted for an offense is not sane, in the sense of that term as it is used in sec. 7240. Rev. Stat., when he has not sufficient knowledge, reason and mental capacity to understand that his act charged to be criminal, was intrinsically wrong, or, having sufficient mental capacity to distinguish right from wrong, he has not sufficient will power to refrain from doing the wrong. *State v. Kalb.* 738

15. A person may be mentally insane, and yet not legally insane. *Ib.*

16. Judgment rendered against an adjudged lunatic, idiot or imbecile, by a court having jurisdiction of parties and subject-matter, is binding and conclusive upon him, and can not be impeached in any collateral action, and stands as a valid adjudication until annulled or reversed in some direct proceeding for that purpose. *Neff v. Cox.* 377

17. Judgment against an adjudged lunatic and his guardian does not create a lien upon the real estate of the lunatic. *Ib.*

INSOLVENT ESTATES—

1. A creditor of an insolvent estate having the unqualified right to the whole of a certain fund, is entitled to interest accruing thereon pending litigation concerning it be-

tween such creditor and the administrator; and in such a case the creditor cannot be compelled to accept a percentage with the creditors of the deceased. *In re Robb's estate.* 381

2. Funds of an insolvent estate in the hands of the administrator, unlike assets in the case of an assignment, are subject to taxation. *Ib.*

3. A person largely indebted can not give away his property without amply providing for payment of his debts. Such a gift is never upheld unless property is retained, clearly and beyond doubt sufficient to pay all the donor's debts. *Hayes v. Moore.* 520

INSURANCE, FIRE—

1. Where an insurance company issues a policy upon recommendation of an agent, the act carries with it the proof that the latter was authorized to make contracts for the company. *Hilliard v. Caledonia Ins. Co.* 576

2. The knowledge of the agent of an insurance company, that the applicant for insurance had only a dower interest to be insured, is the knowledge of the company, and, in the absence of fraud on part of assured, the company is bound by the knowledge of such agent. *Ib.*

INSURANCE, LIFE—

1. A person paying premiums upon a policy of life insurance has an equitable right and interest in the proceeds. *Kritline v. Odd Fellows' Ben. Assn.* 592

2. A divorced wife is entitled to proceeds of a policy of insurance, she having been named as beneficiary and subsequently divorced. *In re Insurance Policy.* 561

INTEREST AND USURY—

1. Where the highest legal interest is paid upon a loan the fact that a commission was allowed the agent for negotiating it does not make the contract usurious, when the agent was agent only for purpose of securing applications for insurance and delivering policies. *Hall v. Kummer.* 176

2. In cases in which the liability of stockholders—before suit to enforce their statutory liability is brought—is known to be equal to the face value of the stock, interest will follow from the date of the institution of the suit. *Berger v. Bank.* 277

3. When the ascertainment of that fact must await the findings of a referee, interest should be allowed only from the date of the confirmation of his report. *Ib.*

Interrogatories—Judgment.

4. The usury laws of another state will be upheld in an action in this state upon an obligation executed in such state. *Omaha Loan & Trust Co. v. Bellew.* 159

5. Under sec. 6191, Rev. Stat., an administrator is charged with interest on balance of funds remaining in his hands after filing his final account. *In re Thornton.* 151

6. Where interest is paid at the rate of sixty per cent., and then at lender's request the borrower renews the note and mortgage, but to another person, and after paying the latter at the rate of sixty per cent. again renews to a third person, but at former lender's request, the court will deem the lenders to be co-conspirators, and the transaction as a single one, and, defendants being non-resident or insolvent, will enjoin collection. *Conover v. LeRoy.* 102

INTERROGATORIES—

Whether defendant can be compelled to answer interrogatories before his time for answering has expired, although he has before the expiration of such time filed an answer in which he fails to answer the interrogatories, *quære.* *Jay v. Squire.* 318

INTOXICATING LIQUORS—

1. A municipal corporation in Ohio has no power to legislate upon the liquor question except as provided in the Dow law, 83 O. L., 157. *Columbus v. Schaerr.* 100

2. A Sunday saloon-closing ordinance which fails to make exceptions, provided in the Dow law, for exclusively known medicinal, pharmaceutical or sacramental purposes, contravenes the general policy of the state and is void. *Ib.*

3. An assessment can be lawfully made under the Dow law upon the business of trafficking in intoxicating liquors in a township which has voted against the sale therein under the local option act of March 3, 1888. *Stevenson v. Hunter.* 27

4. In an action to recover money paid to county treasurer as such assessment, the tax duplicate is *prima facie* evidence of every fact necessary to authorize the assessment. *Ib.*

5. "Straight whiskies" are those produced directly from grain, by process of distillation, without the use of any liquid, save water, and are marketable when matured by age. *Block & Sons v. Lewis.* 370

6. Straight whiskies are not "raw materials" under the Dow law, so as to exempt from taxation, al-

though used in making "compound" whiskies and "blends." *Ib.*

7. Whether a fair is in session, within the meaning of the statute prohibiting the sale of liquor within two miles of the grounds, on the day for the production and arrangement of exhibits, and no charge is made for admission, *quære.* *State v. Blank.* 567

8. Section 8899, Rev. Stat., excepting from operation of the Dow law "sales at the manufactory by the manufacturer," does not include sales made by distillers in the conduct of their business at the main office where the books of account and samples are kept and orders received and dispatched. *Wash & Co v. Lewis.* 371

ITINERANT CLOTHIERS—

1. Under the statute of Ohio the rights of creditors of itinerant clothiers that come into this state to do business are placed upon an equal footing, where their claims arise on transactions within the state. *In re Itinerant Clothiers.* 557

2. One creditor has no advantage over other creditors because false representations were made when the debt was created. *Ib.*

JOURNAL ENTRIES—

1. Section 5239, Rev. Stat., which provides that the clerk of the common pleas shall upon receipt of a certified transcript from the circuit court immediately enter it upon the journal, is directory and not mandatory, and all proceedings, and not the journal entries, are the record of the case. *Bank v. Fitch.* 197

2. The court will not correct such entry, when it appears that the mandate as made was carried out by ordering sales of land by sheriff, which sales were made and approved by the court and that complainant's rights have not been prejudiced thereby, while purchasers at the sheriff's sale who have made improvements would be injured by altering the entry. *Ib.*

JUDGMENT—

1. A judgment obtained before a justice of the peace, which has become dormant, cannot be revived by filing a transcript in the court of common pleas. *Kopf v. Denning.* 154

2. A final judgment in the circuit court is not vacated or rendered less as final judgment by the institution and pendency of proceedings in error in the Supreme Court. *Swan v. Railroad Co.* 297

3. Courts have no favorable regard for judgments by confession obtained upon the last day of a term and

Judicial Notice—Jurisdiction.

JUDGMENT—Continued—

without notice to the judgment debtor.
McClure v Bowles. 288

4. The very taking of such judgment at such time, when the court is deprived of supervisory control over its journal, is enough to justify, at least, a suspicion that the holder of the note is to some degree unwilling to meet the maker upon issue fairly joined. *Ib.*

5. The fact that the note authorized judgment to be confessed in "any court of record in the state of Ohio or elsewhere" does not render the judgment void for uncertainty, inasmuch as judgment was taken in the county where the note was made and the maker resides. *Ib.*

6. In the case at bar, judgment was confessed, not in favor of payee, but to a stranger to the note, which had been indorsed by the payee in blank. The holder, therefore, was not an "assign" of the payee and judgment in his favor was not authorized, and if a defense to the note is shown such judgment will be vacated. *Ib.*

7. Judgment rendered against an adjudged lunatic, idiot or imbecile, by a court having jurisdiction of parties and subject matter, is binding and conclusive upon him, and cannot be impeached in any collateral action, and stands as a valid adjudication until annulled or revised in some direct proceeding for that purpose. *Neff v. Cox.* 377

8. Judgment against an adjudged lunatic and his guardian does not create a lien upon the real estate of the lunatic. *Ib.*

9. A judgment lien is purely the creature of legislative enactment. *Ib.*

10. Such lien does not per se constitute a property right in the land itself, but only gives a right to levy on the same and have it applied to the satisfaction of the judgment. *Ib.*

11. The only right that a judgment creditor has, is to make his lien effectual by sale under execution, to the exclusion of adverse interests acquired subsequent to his judgment. *Ib.*

12. M, a judgment debtor, induces K to advance money to buy a judgment lien upon her real estate, which her judgment creditor is pressing for payment. K examines the title, pays the money and becomes assignee of such lien, in good faith, without knowledge that M's grantors have an interest in the estate: Held, that K is a quasi purchaser; that he has a better title than his assignor had, and that his equity is superior

to that of M's grantors. *Duhme v. Mehner.* 107.

JUDICIAL NOTICE—

Courts will take judicial notice of the coincidence of the days of the week and the days of the month, and will, accordingly, read into a petition that a certain day of the year fell on Sunday. *Warren v. Theater Co.* 559.

JUDICIAL SALES—

1. The rights of a purchaser at a judicial sale as to payment of taxes out of the proceeds, are fixed by date of sale, and after confirmation relate back to that date. *Scheid v. Scheid.* 559.

2. A bid at judicial sale, of less than two-thirds of appraised value of the property, is not, however small the deficiency, a bid which the court is bound to accept. *In re Specker and Bros : assignment.* 586.

3. The fact that there is no coin of the country small enough to represent the deficiency is not a sufficient reason why it should not be noticed or the sale set aside. *Ib.*

4. Where there were two parcels of property, the bid on one which was one third of a cent more than two-thirds of the appraised value, cannot be offset against the deficiency in the amount offered for the second parcel. *Ib.*

5. Where the devisee of such life estate conveys it by mortgage and upon foreclosure proceedings the court decreed that the life estate of such devisee be advertised and sold according to law, which was done, but in the entry of distribution ordered a deed to the purchaser in fee simple: Held, that the life of the purchaser's deed is the decree and that the court could not on distribution enlarge or diminish the estate sold under that decree. *Archer v. Brockschmidt.* 348

JURISDICTION—

1. If defendant makes no objection to the jurisdiction of the acting police judge until after his decision in the case, he has waived that objection and cannot raise the question afterward. *Brown v. Toledo.* 210.

2. The probate court has no jurisdiction to entertain an inquiry as to the mental condition of a person, alleged to be insane, who is under indictment in the court of common pleas. *State v. South.* 588.

3. The statute provides, in such cases, that the prisoner's sanity may be determined by a trial in the court of common pleas, prior and independent to his trial under the indictment. *Ib.*

Jury—Lease.

4. A state court has jurisdiction of an action to enforce an equitable lien upon property of a railroad company commenced prior to foreclosure proceedings in the federal court, when that court no longer has jurisdiction and the rights of plaintiffs in the state court were not adjudicated in the proceedings in the federal court. *Adelbert College v. Railway Co.* 14.

JURY—

1. A juror being the adopted son of a cousin of one of the parties defendant, is not such a relationship as will exclude such juror from service on the jury. *Thomas v. Commissioners.* 610

2. The fact of such relationship, unknown to the juror, is not ground for a new trial; though had he known his relationship, it would have been his duty to disclose it. *Ib.*

3. In a common law action the impaneling of the jury is a part of the trial of a cause. *Railroad Co. v. Kloeb.* 217.

4. In an action by a railroad company to condemn and appropriate to its use five separate parcels of land belonging to as many different persons, all the defendants are jointly entitled to put two peremptory challenges, and no more. *Ib.*

5. The right of peremptory challenge in condemnation proceedings is one of privilege, and not one of right. *Ib.*

6. The act of May 18, 1894, repealing the struck jury law, does not affect cases pending at the date of its passage. *McDonald v. Lane.* 37

7. Section 6607 construed with secs. 6608 and 6547, Rev. Stat., does not, in forcible entry and detainer, limit the right of trial by jury to a demand either on return or appearance day. *Miller v. Schmidt.* 4

8. In a prosecution for the violation of the act of April 20, 1894 (91 O. L., 162), or any regulations duly made and prescribed by the county commissioners in pursuance thereof, mayors of cities not having a police court, have final jurisdiction to hear and determine such prosecution, without a jury. *Ward v. State.* 230

9. The accused in a prosecution of this kind is not one which by the constitution entitles him to a trial by jury. *Ib.*

10. It is an offense created by statute, punishable by fine only, and not known to or punishable at common law. *Ib.*

11. The object of allowing the jury to view the premises in a ditch proceeding, is to allow them to apply

their own judgment to the questions to be determined, as well as to better understand the evidence. *Thomas v. Commissioners.* 503

12. During the view of such premises, the jury may ask the surveyor questions concerning matters of fact, but he is to express no opinion thereon. *Ib.*

13. In arriving at their conclusions, the jury should take counsel of their own experience and knowledge of like subjects. *Ib.*

14. The questions as to the necessity of construction of drains are questions which, by our constitution, are not required to be tried by a jury, and, therefore, they are not such questions as would require unanimity of the entire twelve jurors to find a verdict thereon. *Thomas v. Commissioners.* 510

15. Under sec. 4469, Rev. Stat., it is sufficient for a finding, either for or against the proposed improvement, that eight jurors should agree. *Ib.*

LARCENY—

1. An allegation in an indictment, charging the property stolen to be the property of a railroad company, is sufficiently proved if the evidence establishes the fact that the property was rightfully in the custody of the company as a common carrier, though it was in fact the property of a shipper. *State v. Long.* 617

2. No grievance committed by a railroad company upon accused, or the rights of accused, can justify his committing a theft upon the company. *Ib.*

LEASE—

1. When a wife is entitled to a royalty on an oil lease owned by her husband, and she permits him to transact her business, such royalty cannot be asserted against a mortgagee of the husband without notice. *Fuhrer v. Buckeye Supply Co.* 187

2. Such claim for royalty is, however, prior to claims of other creditors, because it is an equitable right. *Ib.*

3. The expense of an unsuccessful effort in "fishing" for lost tubing, may be a proper item of expense in favor of a mortgagee in possession of an oil lease, in an accounting. *Ib.*

4. Where a coal lease provides that it shall "be good as long as there remains coal unmined," and lessee under such lease fails for eleven years to operate under it; such lessor and those claiming under him have a right to presume that the lease has been abandoned; and the lessor's administrator will be entitled to sell such land

Libel and Slander—Limitation.

LEASE—Continued—

free and unincumbered from this lease, to pay the debts of decedent. *Welty v. Wise.* 223

5. The buildings contemplated by the provision in a lease that lessor should pay "the cash value of all good and fitting permanent brick buildings, suitable to the location, that may be on said leased premises at the end of the term aforesaid" are such brick buildings as are of good materials, well put together, and which, in point of construction, architecture, height, appearance, age and adaptability for use and occupancy, compare favorably with buildings in that locality, and are strong, durable and capable of being useful for many years to come. *In re Building Lease.* 556

6. By "location" as used in this lease is meant, "that part of town," "the vicinity" or "the neighborhood," including such area as that, within it, a man of ordinary intelligence, with ordinarily good eyesight, standing at the intersection of streets, and looking in both directions on streets on which said buildings are located, can distinguish the height, general character and general appearance of buildings. *Ib.*

7. The measure of damages is the cost of the buildings in question, new at the expiration of the lease, less depreciation through age, wear and tear, from the time of construction to the date of expiration of the lease. *Ib.*

LIBEL AND SLANDER—

1. An injunction cannot be granted to restrain a threatened libel. The proper remedy is to wait until the libel occurs and bring suit for damages. *Columbus Grocery Co. v. Wholesale Grocers' Assn.* 582

2. To charge a man with calling upon unmarried women as an unmarried man, when he is married, conveys the idea that he calls on the pretense that he is an unmarried man. It amounts to charging an indictable offense and an action for slander lies. *Gray v. Wood.* 580

3. In order to maintain a suit for libel, where the communication complained of was privileged, such as a communication to the board of education by which plaintiff was employed, it is necessary to show both falsity and express malice. *Nolan v. Kane.* 105

4. Without proof of falsity and the only evidence of malice a remark that defendant "would get even" with plaintiff, court takes the case from the jury. *Ib.*

5. Under sec. 4983, Rev. Stat., an action for slander shall be commenced within one year. *Pearl v. Koch.* 5

6. The statute of limitations will commence to run from the time the alleged slanderous words are spoken, and not from the time plaintiff first had knowledge of the fact that they had been spoken. *Ib.*

7. Where testimony of witnesses or statements of interested parties in a criminal prosecution are published in good faith by a newspaper, as a matter of news, no action will lie in libel, even though such statements prove unfounded in fact. *Coleman v. Ohio State Journal.* 579

8. In an action for libel founded on a writing published in the course of justice, the defense of privileged communication is not overcome by showing that the court in which the matter was published had no jurisdiction in the particular case then pending, by reason of the limitation of time, if such court had a general jurisdiction of the subject of the proceeding. *Lamprecht v. Crane.* 753

9. And for prosecuting such proceeding in such court maliciously and without probable cause an action for malicious prosecution will lie. *Ib.*

10. The final judgment in an action for libel on the publication of an affidavit for such a search warrant, is not a bar to an action for trespass in executing the warrant, where such warrant was void for want of jurisdiction in the court that issued it. *Ib.*

LIMITATION—

1. Section 4983, Rev. Stat., requires that action for slander shall be commenced within one year. *Pearl v. Koch.* 5

2. In a court of law this statute must receive a strict construction, and no exception can be introduced not authorized by the legislature. *Ib.*

3. The statute of limitations will commence to run from the time the alleged slanderous words are spoken, and not from the time plaintiff first had knowledge of the fact that they had been spoken. *Ib.*

4. Action against executors being based on fraud, is barred in four years, and is not within the ten year provision of sec. 4985, Rev. Stat. *Jones v. Proctor.* 416

5. The executors being made parties defendant by amendment to the petition, at a date more than four years subsequent to the perpetration of the fraud, the action as to them is barred, though the original petition

Malice—Malicious Prosecution.

against the partners was filed within four years. *Ib.*

6. Right of action of an heir entitled to a share in the distribution of an ancestor's estate, will be barred by the statute of limitations six years from the date of the administrator's default, if such heir is of age and competent to sue in his own behalf. *Duhme v. Mehner.* 107

7. If by deceit or fraud, the heir is induced to agree to surrender any rights against the administrator, such heir must bring his action to set aside such agreement within four years after a discovery of such fraud. *Ib.*

8. An action to enforce a lien arising on equipment bonds issued by a railroad company, is an action for equitable relief; and the period of limitation of such actions is ten years from the date when the cause accrues. *Adelbert College v. Railway Co.* 14

9. The cause of action on each installment accrues when the principal of the same matures. *Ib.*

MALICE—

1. Malice, in a legal sense, means a motive or purpose from which flows the act injurious to another person, and done intentionally and without lawful excuse. *State v. Bennett.* 339

2. Malice may be express or implied, and will be implied where there is an unlawful purpose and intent to cause damage or loss to another. *Mattison v. Railroad Co.* 125

3. A thing done with a wicked mind and attended with such circumstances as plainly indicate a heart regardless of social duty and fully bent on mischief, indicates malice within the meaning of the law. *State v. Miller.* 703

4. Malice does not necessarily mean ill-will or hatred toward the person injured. It is evidenced by an act or by acts which spring from a wicked motive, attended by circumstances indicating a heart regardless of social duty and bent on mischief. *State v. Snell.* 670

5. Malice is said to be express when the cruel act is done with deliberate mind, with a settled and formed purpose. *Ib.*

6. Malice is implied when the unlawful act done is sudden and without any great provocation, and also where the act done necessarily shows a depraved heart, as the giving of poison and the like. *Ib.*

MALICIOUS PROSECUTIONS—

1. Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong

in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he or she is charged. *Johnson v. McDaniel.* 717

2. Where the person instituting a prosecution omits to make such inquiry and investigation into the conduct of the accused as would have suggested itself to an ordinarily prudent person, and such investigation would have discovered that accused was not guilty of the offense, the accused is not absolved on the ground of reasonable cause. *Ib.*

3. The fact that the accused has uniformly borne a good reputation as a law abiding and well behaved person, and that accuser knew that such was his or her reputation, is a fact to be considered in determining whether or not accuser had reasonable cause to believe accused guilty of the offense. *Ib.*

4. In proof of malice it is not necessary to show personal grudge or ill-will or hatred. *Ib.*

5. It is sufficient if the evidence shows that the accuser, in the beginning and conducting the prosecution, showed a gross, wanton, reckless disregard of the rights of the accused. *Ib.*

6. The jury may infer malice, legal malice, from want of probable cause for the prosecution. *Ib.*

7. If accuser took pains to obtain all the facts which, by reasonable diligence could be obtained, and submitted them truthfully to a reputable attorney, who advised accuser that he had ground for prosecuting accused, and the prosecution was carried on in the honest belief that there was ground for it, the accuser is relieved from imputation of malice, although the prosecution failed. *Ib.*

8. The fact that an accuser consulted an attorney and acted on his advice, may also be considered as mitigating the damage. *Ib.*

9. As part of the compensatory damages, the jury may assess that which will compensate accused for the injury done to character, reputation and credit by the prosecution. *Ib.*

10. The jury may also assess a reasonable attorney fee for counsel employed by accused, and also for the value of time consumed in making defense to the prosecution. *Ib.*

11. Remuneration for mortification, humiliation and shame and anguish of mind suffered by reason of arrest and imprisonment may be included in compensatory damages. *Ib.*

Mandamus—Mechanics' Liens.

MALICIOUS PROSECUTION—Con.—

12. The fact that accused was incarcerated in a filthy cell, etc., may be considered in determining whether the arrest and imprisonment amounted to personal insult and indignity to her, which could necessarily or probably impair her bodily health and wound her feelings, producing mental anguish. *Ib.*

13. When the accuser, in beginning and conducting the prosecution, was swayed by actual malice, in contradistinction from legal malice, the jury may give exemplary or punitive damages. *Ib.*

14. A man of high character and known force and influence in the community may injure another by wrongfully prosecuting him, more than a man of less character could do. *Ib.*

15. If the accused had a well established character or reputation, there is less probability of the wrongful criminal prosecution injuring than if such person was new in the community, just starting in an effort to build up a reputation. *Ib.*

16. For prosecuting an action for libel in a court, without jurisdiction, maliciously and without probable cause, an action for malicious prosecution will lie. *Lamprecht v. Crane.* 753

17. Where a prosecution is sought to be justified on the ground of advice of counsel, it is incumbent on the prosecution to show that all the facts material to the prosecution known to him, or which might have been ascertained by reasonable diligence, were communicated to counsel. *Ib.*

18. Where an action for libel on the publication of an affidavit for a search warrant has been defeated on the ground that the publication was privileged, the record of such is not admissible in evidence, even on the question of damages, in a subsequent action between the same parties for a malicious prosecution or for trespass in executing the search warrant. *Ib.*

MANDAMUS—

1. Mandamus will not lie to compel the county auditor to issue a second warrant, where the first has been illegally paid by the treasurer to an agent, who committed suicide before accounting to the company. *State v. Auditor of Hamilton Co.* 545

2. A member of a private corporation organized for the mutual protection and relief of its members, though unlawfully expelled and excluded from participation in its bene-

fits, is not entitled to a writ of mandamus to compel it to restore him to membership, because:

1. Such restoration is not an act specially enjoined by law.

2. He has a plain and adequate remedy in the ordinary course of the law. *Fraternal Mystic Circle v. State.* 754

MASTER AND SERVANT—

1. Where there is no contract between a railroad company and one of its employees binding either for a specified length of time, the employment may be terminated by either at any time with or without cause. *Mat-tison v. Railroad Co.* 125

2. While such company has a right to discharge such employee, it has no right to interfere with or prevent such employee from obtaining employment elsewhere. *Ib.*

3. Where such company, by its agents or officers, by their action in enforcing the rules of the company, render it impossible for such employee to obtain other employment in his chosen vocation as a railroad man, such company shall be liable in damages to such employee. *Ib.*

4. It is not necessary in such case to prove a combination between railroad companies through their officers in the enforcement of their rules. *Ib.*

5. If the company acted intentionally, wilfully and maliciously, and thereby caused damage to the discharged employee, he is entitled to recover damages. *Ib.*

6. An owner or employer is exercising ordinary care and prudence if he directs persons holding themselves out to be carpenters of ordinary skill to erect a building according to certain plans known to the workmen, out of materials upon the ground, having no defects that could not clearly be seen and of dimensions well known to the mechanics. *Warner v. Castings Co.* 106

MECHANICS' LIENS—

1. The lien on a saw mill attaches to all appurtenances, including everything used to drive, but not what is driven. *Gashe v. Ohio Lumber Co.* 130

2. An agreement, by which one who had furnished and previously put up the boiler and engine, made with a mortgagee, treating them as personalty and waving his lien on the real estate, cannot affect other lienors, and the boiler and engine being part of the plant are subject to other liens. *Ib.*

3. Where a material man furnishes suitable material to a person.

Mittimus.

who, to his knowledge, is erecting a building, the law presumes that the materials are furnished for that building and so accepted by the purchaser. *Kunkle v. Reeser.* 422

4. It will presume that the material man intends to retain the right the law gives him to collect payment for the materials furnished by him. *Ib.*

5. In the absence of an agreement not to assert the right to a lien, or facts showing a waiver of such right, such right exists though the personal responsibility of the purchaser was largely relied on for payment by the material man. *Ib.*

6. The lien will, however, extend only to those items furnished under the contract, which are suitable for the building. *Ib.*

7. In order to constitute a "continuing," "subsisting" or "entire" contract, within the meaning of the lien law, there must be something more than mere knowledge that a building is being erected, and the supplying of orders for suitable materials. *Ib.*

8. If there was anything from which an understanding might be inferred that one order would be followed by another until the work was done, or the building completed, it might be held that the contract was of sufficient entirety, so that the last item would save the first. *Ib.*

9. The mere fact that notes were given for the amount due, it not appearing that the account was balanced, or that the notes were given and accepted in payment of the amount due, will not deprive the creditor of his right to assert a lien. *Ib.*

10. The fact that such a note had been indorsed by the creditor to a bank in whose possession it is at the time the lien is asserted, does not deprive the creditor of his right to assert a lien, especially when it appears that such note is afterwards returned to the creditor by the bank. *Ib.*

11. Where the description of the premises required in filing a mechanic's lien, is sufficient to advise purchasers and others of the lien and the land upon which it is claimed, it will be sufficient. *Ib.*

12. Where the debtor makes an assignment before a lien is filed, and the rights of the parties have by such act become largely fixed, it is probable that a less definite description will answer than would otherwise be required. *Ib.*

13. When the contract is not in writing, it is not necessary under sec. 3185, Rev. Stat., to insert in the affida-

vit for a lien, a "statement of the amount and times of payment to be made thereunder." *Ib.*

14. Where the contract is not in writing the presumption is that payments are entire and the time, cash. *Ib.*

15. Where the builder came to a material man with a memoranda of materials then needed, and desired prices on them, adding that he was going to build four or five greenhouses, and that he wanted the material man to furnish the lumber, which he did as he ordered it, the contract was entire. *Ib.*

16. Where a note due four months from date is given the material man, but the last item is not furnished until several months later, the time of payment is not extended beyond the time at which a lien may be filed. *Ib.*

17. Where the affidavit states that the materials were furnished "in and about the alteration and repair of a greenhouse building," when they were in fact used in the erection of five greenhouse buildings, all connected, the variance in the affidavit is not sufficient to affect the lien. *Ib.*

18. The assignees of contracts for erection of heating appliances will be postponed as to their claim upon funds arising from the contract, to holders of any mechanics' liens which may have been acquired, either upon the property or upon the fund arising from the contract. *Iron Co. v. Heating & Ventilating Co.* 292

19. Where there is substantially one corporation, or where there may be two corporations doing substantially one thing; the one being at all times in the control of the other; under such circumstances there is no principle upon which one can assert a mechanic's lien against the other. *Ib.*

20. The decision of the Supreme Court in 55 O. S., 423, declaring invalid those sections of the mechanics' lien law, 91 O. L., 135, permitting sub-contractors to take a lien on a building for the construction of which he has furnished material, does not invalidate the entire law. *In re Mechanics' Lien Law.* 564

21. The right of the original contractor to have a lien on a building which he has erected is not affected by said decision. *Ib.*

MITTIMUS—

A mittimus is not necessary to hold a prisoner committed to the workhouse when the officer bringing him has a transcript. *In re Workhouse.* 574

Mob Violence Law—Municipal Corporations.

MOB VIOLENCE LAW—

The act of the legislature, passed April 10, 1896, (92 O. L., 136) and entitled, "An act for the suppression of mob violence," is unconstitutional. *Mitchell's Admr. v. Commissioners.*

262

MORTGAGES—

1. A mortgagee whose loan went to pay off a purchase money mortgage is not subrogated to the latter's priority where there was no intention to that effect in the transaction. *Gashe v. Ohio Lumber Co.*

130

2. It is not the fact of handing a mortgage to a recorder and his indorsement thereon of the time of filing, which makes the mortgage notice of the lien created by it; but the fact that it was so presented to the recorder for record, and by him indorsed and filed in his office, where any interested party may inspect it, which makes it notice of the lien created by it. *Kalb v. Wise.*

533

3. The object of filing a mortgage in the office of the recorder is two-fold: First, to fix the time when the lien attaches; second, as a public notice of the fact of the lien and the precise time when it attached. *Ib.*

4. To constitute a delivery of a mortgage to the recorder "for record" within the meaning of sec. 4133, it must be delivered at the office of the recorder and deposited in such office where it can be inspected. *Ib.*

5. A delivery to the recorder when not in his office, or to another person outside the recorder's office, is not effectual until the same is placed on file in the office of the recorder. *Ib.*

6. A decree in a suit brought by the trustee of a mortgage for the foreclosure of that mortgage does not estop the same person suing as a stockholder. *Henry v. Railroad Co.*

41

7. Foreclosure is nothing more or less than the extinction of the mortgagor's equity of redemption by the sale of the premises and the application of the proceeds to payment of mortgagee's claims. *Keifer v. Spence.*

609

8. The general rule that open, notorious and visible possession is constructive notice to all who may take mortgages on land cannot be applied against a purchaser or mortgagee from a vendee whose vendor remains in possession. *R. R. Employees' Bldg. & Loan Assn. v. Dawson.*

583

9. If the assignee of a mortgage fails to have the same recorded he makes the party to whom the mortgage was originally payable, his agent,

and his claim holds no priority over innocent persons. *In re Mortgage.*

556

MUNICIPAL CORPORATIONS—

1. A city council has the right to reasonably regulate the actions of theatrical managers in the operation of their business. *Cincinnati v. Brill.*

566

2. An ordinance providing that it shall be unlawful for any person to sell reserved seats for a theatrical or other performance after the doors of the theatre have been opened, is within the rule above stated. *Ib.*

3. The fact that the seats were purchased and reserved the day before would not exempt the seller from the operation of the law. *Ib.*

4. If a speculator buys tickets he becomes, in effect, an agent of the house and liable under the ordinance in question. *Ib.*

5. An ordinance is not invalid because the penalty is prescribed in a separate section of the same ordinance from that describing the offense. *Brown v. Toledo.*

210

6. A municipal corporation has no power to legislate upon the liquor question except as provided in the Dow law, 83 O. L., 157. *Columbus v. Schaerr.*

100

7. A Sunday closing ordinance which fails to make exceptions provided in the Dow law, for exclusively known, medicinal, pharmaceutical or sacramental purposes, contravenes the general policy of the state and is void. *Ib.*

8. A contract awarded under an advertisement for proposals made on the tenth or last day of the advertisement of an improvement ordinance is illegal. *Fath v. Clifton.*

567

9. The advertisement for such proposals should not be made prior to the eleventh day. *Ib.*

10. Contracts for lighting streets and public places in Cincinnati are void unless the city auditor certifies that the necessary funds are in the treasury to the credit of the fund for that purpose. *In re Street Lighting.*

579

10. Where a city is not entitled to demand, and has not demanded a part of the bridge fund, it is not bound to keep the bridges within its limits in repair. *Sullivan v. Newark.*

388

11. The duty of repairing such bridges falls upon the county commissioners and township trustees, and, therefore, such city is not liable in an action for damages for injuries received by a person by reason of a

Mutual Benefit Society—Notary Public.

bridge within its limits being out of repair. *Ib.*

12. The mere fact that an ordinance in reference to sidewalks contains certain penal provisions, does not confer any right or privilege upon any person, in respect to other acts not made penal in such ordinance. *McCormick Harvesting Machine Co. v. Kauffman-Lattimer Co.* 468

13. The mayor of any city of the second class, fourth grade, has jurisdiction in criminal cases throughout the county, and may by warrant cause any person charged with the commission of a felony or misdemeanor to be arrested and brought before him for the purpose of inquiring into the complaint. *State v. Miller.* 703

14. It is the express duty of the marshal of such city to execute all warrants and writs so issued. *Ib.*

MUTUAL BENEFIT SOCIETY—

In the absence of fraud or conspiracy, courts will not supervise or interfere with the action of the board of directors of a chamber of commerce, in the trial of a member charged with unmercantile conduct. *Bishop v. Chamber of Commerce.* 356

NEGLIGENCE—

1. Ordinary prudence requires that a person in the full enjoyment of the faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use them for the purpose of discovering and avoiding danger from an approaching train, and omission to do so is negligence. *Krasinski v. Railroad Co.* 155

2. Whether defendant was negligent in requiring plaintiff to perform his work in a room where there were dangerous and poisonous gases, and where there were drafts of cold air blowing upon him, is a question for the jury. *Maitland v. Railroad Co.* 636

3. Before plaintiff can recover for injuries sustained by being required to work in such room it must be shown by a preponderance of the evidence that defendant, through its agents or servants, knew, or by the exercise of ordinary care ought to have known, of the dangerous effects of said poisonous and unwholesome atmosphere. *Ib.*

4. Before the jury can find negligence in the speed of the car or failure to sound the gong at the crossing it must be determined that the act or omission was the cause of the inquiry

in controversy. *Altemeier v. Cin. St. Ry. Co.* 655

5. Whether the conduct of a person and that of the railway company shows such person to have been a passenger is a question for the jury. *Altemeier v. Cin. St. Ry. Co.* 655

6. Where the evidence shows the relation of carrier and passenger the law imposes upon the former the "highest degree of care" as distinguished from ordinary care. *Ib.*

7. It is a reasonable and necessary rule that a higher degree of care should be exercised toward a child incapable of using discretion commensurate with the perils of the situation than one of mature age and capacity. *Ib.*

8. Evidence that a car was going pretty fast or very fast, does not tend to prove that the car was being driven at an unlawful, negligent or dangerous rate of speed. *Baumgardner v. Street Ry. Co.* 159

NEW TRIAL—

1. The disposition of a motion for a new trial by reason of misconduct of the jury, rests to a very large extent, though not entirely, in the discretion of the trial court. *Thomas v. Commissioners.* 510

2. It should take into consideration its knowledge of the case, and the standing of the parties and what is known of the parties making the affidavits. *Ib.*

3. A juror being the adopted son of a cousin of one of the parties defendant, is not such a relationship as will exclude such juror from service on the jury, and the fact of such relationship, unknown to the juror, is not ground for a new trial. *Ib.*

4. The fact of a conversation between a juror and one of the parties to the action on matters bearing upon the action, will not be ground for a new trial, where neither party knew the relation which the other sustained toward the case, and where neither had any wrong intentions, and where it does not appear that the conversation has unfavorably affected the party seeking a new trial. *Ib.*

5. The mere fact that one of the jurors took a ride with one of the parties to the action, while it places the juror in a suspicious position, is not ground for a new trial. *Ib.*

NOTARY PUBLIC—

1. A notary public who certifies in blank to receipts for salary of a public officer or employee, is guilty of misconduct in office, justifying his removal. *In re Hayman.* 550

Nuisance—Parent and Child.

NOTARY PUBLIC—Continued—

2. Under the laws of Ohio, a United States consul is not authorized to act as a notary public in the taking of depositions. In re Herckelrath's estate. 565

NUISANCE—

1. A garbage plant which casts upon the premises and into and about the dwelling of a property owner in the vicinity, noxious odors, vapor and gases, causing material inconvenience and discomfort, is a nuisance and may be abated by injunction. *Munk v. Columbus Sanitary Works Co.* 548

2. Where defendant, in loading and unloading goods at its building, has its wagons standing on the sidewalk from three to forty minutes at a time, and from one to two hours each day, and wagons of its customers an hour each day, thereby preventing pedestrians, during such time, from using the sidewalk and making it necessary for them to walk in an unpaved street, such acts constitute a public nuisance under sec. 6884, Rev. Stat. *McCormick Harvesting Co. v. Kauffman-Lattimer Co.* 468

3. Where plaintiff's place of business is situated near defendant's building, and plaintiff's customers and tenants use the sidewalk obstructed by defendant; plaintiff may, under such circumstances, obtain a permanent injunction against defendant for maintaining such nuisance. *Ib.*

4. Where, by reason of a public nuisance, an individual sustains a special injury he may recover such special damages, whether direct or consequential. *Ib.*

5. Before an individual can maintain an action, either for damages or for an injunction because of the obstruction of a highway, he must prove some damage peculiar to himself and not suffered in common with the general public. *Ib.*

6. An unlawful use of the sidewalk is not warranted by the facts that defendant had no other means of getting its goods in and out of its building, other than by means causing a temporary obstruction of the sidewalk. *Ib.*

7. The fact that the evidence fails to show that plaintiff has lost any customers, or business, or tenant, or rent, or the extent of the depreciation of its premises, by reason of the obstruction, is not decisive of the question of the injury suffered by him. *Ib.*

OFFICE AND OFFICER—

1. An acting police judge appointed by the mayor according to sec. 1802, Rev. Stat., to act during absence or disability of police judge, is at least, a *de facto* judge. *Brown v. Toledo.* 210

2. Corruption, when applied to officers, etc., signifies inducing, by means of pecuniary consideration, a violation of duty. *State v. Iden.* 627

3. An act is said to be corrupt or corruptly done, when the chief motive is a design to acquire an advantage of a pecuniary nature or when it is done for unlawful profit. *Ib.*

4. While it is competent for a public officer to employ a deputy to assist him in the performance of the duties of his office, it is contrary to public policy for such officer to turn over his whole office to another; and a contract embodying such agreement is void. *Moore v. Cassily.* 573

5. As the inspector of boilers and inspector of hulls constitute a board for examination of steamboat engineers, the action of the latter in turning his office over to the former placed all the authority of the board in one individual, and the agreement is void for that reason. *Ib.*

6. Asking other members of the legislature to support bills and resolutions, collecting and presenting facts and reasons to them and making arguments to induce them to do so, constitute "official action" and the exercise of "official duty" by a member of the legislature. *State v. Geyer.* 646

PARDON—

1. A pardon obliterates the record of the conviction, so far as the operation of the habitual criminal law is concerned. *State v. Williams.* 545

Accord *State v. Anderson.* 548

2. A pardon once granted cannot be revoked. In re Biegle. 583

3. The fact that one of the signatures to the application was given under a false impression does not warrant a workhouse board in refusing to liberate a prisoner thus pardoned. *Ib.*

PARENT AND CHILD—

1. The right of a parent to the possession and society of a minor child, is a right of which the parent can be deprived only when he has forfeited that right, by misuse of the child, or other proper reasons. *Boescher v. Boescher.* 184

2. A father having placed children in the custody of a third person, with agreement to pay a certain sum

Parties—Partition.

for their board and care without provisions as to clothing, is nevertheless liable to such third person for such clothing as was necessary, reasonable and fit for such children and was not furnished by him. *Quigley v. Murphy.* 680

3. The clothing that was reasonable, fit and suitable for such children is what the children of other parents in like situation in life and like financial ability usually have. *Ib.*

4. The father's liability to such third person, under agreement for board and care of his children, is not terminated by mere notice that he will no longer be responsible for such board and care. *Ib.*

5. His liability continues so long as he allows the children to remain in the custody of such third person, unless it appears that the latter refused to deliver the children, upon the father's demand, or interfered with his taking them away. *Ib.*

6. It is the duty and obligation of the father to provide reasonably for the support of his minor children, if he be of ability to do so. *Ib.*

7. Where the father, being able, neglects or refuses to so provide, so as to render it necessary that some other person should so provide or care for them, then the law implies a promise or obligation on the part of the father to pay for the proper amount and kind of care, clothing and support of his minor children. *Ib.*

8. The duty of a father toward his minor children is not affected by an agreement of separation with his wife, no matter what causes the separation or by whose fault it was produced. *Ib.*

9. In determining whether a father's discretion has been properly exercised, in placing his children in the care and custody of a third person, everything which would affect the comfort, health and physical well being of the children, and their prospects for happy and useful lives, should be considered. *Ib.*

10. A place having been selected by the father for the care and support of his children, under the discretion vested in him, the presumption is that the place is a suitable one, and the burden is upon those claiming adversely to show that it is not. *Ib.*

11. If such place is not a suitable one, and the infants are of such tender age as not to have the ability or judgment to act for themselves, their mother has the right to remove them to some proper place and provide for

their support and maintenance until the father shall provide suitably. *Ib.*

12. Under such circumstances, the father is liable to the person who furnished the means, care and support at the request of the mother. *Ib.*

13. Circumstances which raise an implied promise on the part of the father to pay the reasonable value of the board, clothing and care furnished his minor children. *Ib.*

14. The fact that the mother told the father that she was providing for the support of the children, and that he would not be called on to make payment for same, unless brought to the knowledge of the third person having the care and maintenance of such children, does not affect such implied promise. *Ib.*

15. The amount of compensation which such third person is entitled to receive is not governed or limited by the father's prior agreement with another party, where he himself placed the children, but the reasonable value of the board, care and clothing so furnished. *Ib.*

PARTIES—

1. The city and persons responsible for an unguarded excavation in a street, cannot be joined as co-defendants in an action for resulting injuries. *Zeigler v. Ashley.* 163

2. An action by one bondholder "in his own behalf as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of the suit," is binding only on those who are made or become parties to the suit. *Adelbert College v. Railway Co.* 14

3. The parties who are not named are not parties to the suit and are not bound by proceedings therein, unless they elect to come in and claim as such, and bear their proportion of the expenses; or unless, after having had notice, they refuse or neglect to do so. *Ib.*

PARTITION—

1. It is not permissible for a party to raise, or attack collaterally in another proceeding, errors that may have occurred in a previous partition proceeding. *Glemser v. Glemser.* 267

2. Whatever errors may have occurred in such proceeding, it is for the party aggrieved in that proceeding to prosecute his suit in error, and not wait and attack it collaterally in some other proceeding brought to set aside the original petition. *Ib.*

3. A person standing in the capacity of a guardian or trustee, and

Partnerships—Payment.

PARTITION—Continued—

having a dower interest in the property, may purchase such property at a sale under a proceeding in partition, instituted by a third person. *Ib.*

4. Where a party interested in that proceeding, either personally or as trustee, becomes the purchaser and is bound to pay over money, which under distribution and order of court would be received by him as such trustee or in his individual capacity, the law does not contemplate that he should actually pay over in cash the full amount, but if in accounting he acknowledges to have received that money, either in his personal capacity or as trustee, then in that capacity a receipt so given is the same thing as though he had actually paid the money in cash. *Ib.*

5. A provision in a will that there shall be no division of the estate until ten years after testator's death is valid, and there can be no lawful partition until that time. *In re Reynold's estate.* 570

PARTNERSHIPS—

1. The law relative to the registration of partnerships does not apply to actions for damages, not arising from a contract between the parties. *In re Partnerships.* 578

2. Where there is no joint estate for distribution and no living solvent partner, the joint creditors share pro rata with the separate creditors in the individual estate of one of the partners. *In re Robb.* 227

3. A partnership agreement provided that in case of death of one of the partners, "the surviving partners shall take as purchasers" his share, its value to be ascertained by appraisal. One of the partners died and an appraisal was had: Held, that by virtue of the above clause in the partnership agreement, the title to the deceased partner's assets vested absolutely in the surviving partners, the appraisal not being a condition precedent to the vesting of the title. *Jones v. Proctor.* 416

4. The only claim against the partners was for the price of these assets—a debt—and they held no fund or property in trust for the beneficiaries, and so were under no obligation to account. *Ib.*

5. The debt owing from the surviving partners could only be recovered in a suit by duly constituted representatives of the deceased partner, and not by his beneficiaries, the plaintiffs. *Ib.*

6. No right of action because of the fraudulent appraisal would

accrue against one becoming a partner subsequent to such appraisal. *Ib.*

7. A combination between surviving partners and executors to the end of affecting a fraudulent appraisal of the deceased partner's share, cannot abrogate the obligations created by the partnership agreement, and cannot release surviving partners from the necessity of taking the assets as purchasers, and cannot create in representatives or beneficiaries of the deceased partner any right or interest in the partnership assets. *Ib.*

8. Where the assets of an insolvent co-partnership will pay a small dividend the creditors being numerous, and their claims varying greatly in amount, and there is no living solvent partner, the partnership creditors have a right to share equally with the individual creditors in the distribution of the insolvent estate of one of the partners. *In re Robb's estate.* 381

9. Rights of a married woman as member of a co-partnership. *Raymond v. Breckenridge.* 156

10. The signature of the firm name, signed by a surviving partner to a petition for a street improvement, of property owned by such partnership and abutting on such proposed improvement, cannot be counted as more than the signature of such surviving partner and will only represent his pro rata portion of foot frontage. *Andrew v. Auditor.* 242

PAYMENT—

1. An unauthorized payment to a contractor, by a loan company out of money borrowed for building purposes, must be made good by such loan company. *Kesting v. Donohue.* 153

2. Where a note is deposited with a bank for collection, it has no authority to accept anything but money as payment; and, therefore, giving a check, which the bank accepted, is not payment. *Dunn v. Dewey.* 149

3. The rule that payment of money voluntarily made cannot be recovered back in the absence of fraud or mistake, although it may appear that the money was not due or owing, is applicable to the claims of a county auditor examined and allowed by county commissioners. *Ottawa Co. Com'rs. v. Auditor.* 597

4. The rule that money paid under a mistake of law cannot be recovered from the party receiving it, is also applicable to the claims above referred to. *Ib.*

Perjury—Pleading.

PERJURY—

1. False testimony under oath administered to a witness by a deputy clerk in the common pleas court to testify to such matters and things as may lawfully be inquired of before the grand jury, is within the terms of the statute defining perjury. In re Commissioners. 691

2. The lawful form of oath is that the evidence the witness shall give will be the truth, the whole truth and nothing but the truth. Ib.

3. Having so sworn, the person testifying must wilfully, corruptly and contrary to his oath state a falsehood as to some material matter which he does not believe to be true. Ib.

4. By the language "material matter" is meant the main fact which was the subject of inquiry, or any circumstance which tends to prove that fact. Ib.

5. If a witness makes contradictory statements under oath, before different grand juries, in regard to the same matter, if the two statements are opposite and irreconcilable, one true and the other false, and knowingly made, such witness commits perjury by the false statement. Ib.

6. If a witness swears to a thing of which he consciously knows nothing, the thing being false, it is wilful and corrupt and perjury. Ib.

7. The rule now is that the evidence showing the witness' testimony to have been false must be something more than sufficient to counterbalance the oath of the witness who is accused of perjury, and the legal presumption of innocence. Ib.

PERPETUAL LEASEHOLD—

An administrator of the assignee of a perpetual lease is not personally liable to the owner of the fee, for the payment of rents and taxes which were covenanted for in the lease. Gausen v. Moormann. 287

PHYSICIAN AND SURGEON—

1. A person who holds himself out to the public as a physician surgeon is not required to possess the highest degree of knowledge and skill which the most learned and skillful in his profession may have acquired, but is required to possess and exercise at least an average degree of knowledge and skill. Tish v. Welker. 725

2. One who holds himself out and offers his services to the public as a surgeon impliedly contracts with every one who employs him that he has ordinary knowledge and skill in his profession, and also that he will use reasonable and ordinary care and

diligence in the exercise and application of his knowledge and skill. Ib.

3. It is the duty of a surgeon, when he takes charge of a case such as a broken femur bone, to give his patient all necessary and proper instructions as to what care and attention the patient should give his broken limb. Ib.

4. And it is the duty of the patient to adopt and follow out all reasonable directions and requirements of the surgeon relating to the treatment or care of the injured limb. Ib.

5. By taking charge of a case a surgeon does not thereby guarantee to effect a cure, or restore the broken limb to its normal condition and usefulness. Ib.

6. He is not, therefore, responsible for want of success, unless it is shown to result from a want of ordinary skill or ordinary care and diligence. Ib.

7. It is negligence in a surgeon to employ an unskillful assistant to dress and treat an injured limb. Ib.

8. The surgeon and the assistant are jointly and individually responsible for unskillful or negligent services of the assistant. Ib.

9. Although no instructions are given by the surgeon to the patient as to the care of an injured limb, such patient is required to use and exercise ordinary prudence and care. Ib.

10. Photographic negatives, taken by the X-ray process, showing the shape and size of a broken bone at different times in its treatment, are competent evidence in an action for malpractice. Ib.

PLATS—

Where a plat of a subdivision is ambiguous as to what lengths of lot lines therein worked refer to, the deeds of the original owner may be resorted to, especially if plaintiff claims under them, to show the depth of the lots and proper location of a rear alley. Crane v. Buckles. 539

PLEADING—

1. In action on a warranty alleging certain defects in a machine, such allegations must be specific. Jonte v. Foundry and Machine Co. 162

2. Allegation of waiver in reply sufficient to defeat a motion for judgment on the pleadings. Boehn v. Ins. Co. 161

3. Where matter is brought before the court in the pleadings of one party, such party cannot object to this matter in a subsequent pleading of another party, on the ground that it is misjoinder. Fuher v. Buckeye Supply Co. 187

Power of Attorney—Prize Fights.

PLEADING—Continued—

4. An answer presented to be filed at the time of the trial, may be considered as filed. *Ib.*

5. An allegation that certain matters constitute "a first and best lien," is a mere legal conclusion, and does not constitute the assertion of a claim to a certain fund. *Ib.*

6. A petition filed by the children of the beneficiary under the will of the deceased partner, alleging fraud and collusion between the surviving partners and executors of the deceased partner, resulting in a fraudulent appraisal; and asking that the appraisal be set aside, and that an accounting of partnership assets be had, and that the executors account for the value of the deceased partner's interest, states a misjoinder of causes of action, inasmuch as the obligation of the partners to pay the purchase price arises out of the partnership agreement, and the obligation of the executors arises out of fraud. *Jones v. Proctor.* 416

7. The allegation of expenditures of large sums, out of the partnership funds shortly before the time for the appraisal, though such expenditures were thoroughly legitimate in the carrying on of the business, is an immaterial fact, and will on motion be stricken from the petition. *Ib.*

POWER OF ATTORNEY—

1. The phrase, "any attorney," as used in a power of attorney to confess judgment, fails to identify any person at all as clothed with authority. *McClure v. Bowles.* 288

2. While it is sufficient to indicate a purpose to grant authority, the court is unable to understand how contemplation can be regarded as consummation. *Ib.*

3. This indefiniteness does not fail to confer jurisdiction and thus render the judgment void. *Ib.*

4. A power of attorney attached to a note and forming a part of the same instrument, is not negotiable, and when the note is transferred, becomes invalid and inoperative. *Ib.*

5. Whether the warrant of attorney can be executed for the benefit of a holder of the note other than the payee, must depend upon the language of the warrant itself. *Ib.*

6. But an authority given by warrant of attorney to confess judgment against the maker of the note, must be clear and explicit, and strictly pursued, and any supposed omissions of the parties cannot be supplied. *Ib.*

PRIZE FIGHTS—

1. When two persons by previous agreement enter into a contest for supremacy by the administration of blows with the fist upon the bodies of each other, which contest shall continue until one of them becomes a victor, and when, by such agreement, there is to be given to the victor money or other thing of value, whether such money or thing is the result of a wager between the parties or a reward contributed by others, or the proceeds of door or gate receipts, constitutes a prize fight. *State v. Moore.* 689

2. It is not essential, in order to constitute a prize fight, that the contest should be with the naked hand or fist. *Ib.*

3. It is not necessary, to constitute a prize fight, that the agreement to enter into the contest should have been made for any particular length of time previous to the actual contest. *Ib.*

4. While such agreement to contest for a prize or wager must be an agreement to contest until one of the parties obtains a victory over the other, it is not necessary that such contest should be maintained until such victory is actually obtained or that it should be "fought to a finish." *Ib.*

5. It is not necessary that the prize, wager or reward aforesaid should actually be paid to either of the contestants, for if the prize fight is actually begun the offense is complete, although its final consummation may have been prevented from any cause. *Ib.*

6. It is not necessary that the agreement to contest should be made in any form of words or in writing. *Ib.*

7. It is sufficient if the parties consent to the contract, either by words or gestures, and an agreement may be inferred from the conduct of the parties. *Ib.*

8. The agreement of aiders and abettors of a prize fight will bind the principals only when such agreement is made known to the principals before the contest. *Ib.*

9. Men who fight on wager or for a prize or reward, or with the accompaniments of backers, referees and umpires, do not, in any fair sense, come within the permissive provisions of sec. 6890, Rev. Stat. *In re Athletic clubs.* 696

10. An athletic club or gymnasium which aids or abets a prize fight is liable to indictment, notwithstanding

Proceeding in Aid of Executions—Railroads.

ing the permission of the sheriff or mayor, given under sec. 6890, Rev. Stat. Ib.

11. Any combat which is essentially a prize fight, no matter by what name called nor under what rules or gymnasium or club conducted, nor by whatsoever permission had for its exhibition, is a violation of the statute. Ib.

PROCEEDINGS IN AID OF EXECUTION—

In a proceeding in aid of execution against the superintendent of a county infirmary, in which it is sought to seize the wages of such superintendent; the county has a right to hold so much of the amount due defendant, as superintendent, as will be necessary to satisfy the taxes due the county by such superintendent and apply it to their payment, and the county is not compelled to resort to its tax lien. *Beckett v. Wishon.* 257

PURE FOOD LAWS—

1. The act to prevent deception in sale of dairy products and to preserve the public health (88 O. L., 51), is constitutional. *Holtgreive v. Ohio.* 166

2. The affidavit should contain such a statement of the nature and cause of the accusation as would impart to the accused reasonable information of the charge, so as to enable him to prepare his defense. *Emery v. State.* 121

3. An affidavit substantially in the words of the statute upon which the prosecution is based, is sufficient where the statute itself sets forth and defines the offense. Ib.

4. The statute providing against sale, etc., of adulterated food, etc., passed in 1890, which makes the U. S. Pharmacopœia the standard as to genuineness of drugs, it is, therefore, error to admit as conclusive a U. S. Pharmacopœia published in 1894, without showing that the test prescribed in the later edition is the same as was prescribed in the edition when statute was passed. Ib.

5. In order to entitle defense to a sample of the article in possession of the state on which the prosecution is based, it must be shown that they have no other way of making a defense as to the ingredients of the article in question. *State v. Breckenridge.* 546

6. The court must appoint the expert who is to make the analysis for the defense, and the analysis must be conducted in the presence of the

expert who made the analysis for the state. Ib.

7. When the application is made the court may appoint whoever it pleases to make the analysis for the defense, and is not bound to follow the suggestion of defendant. Ib.

8. The motion for the analysis in behalf of the defense must not be made for purpose of annoying the state; it must not be made out of mere curiosity, and it must not be made for purpose of disclosing what evidence the state has. Ib.

9. It is not obligatory on the court to appoint an expert or cause an analysis, but is a matter of discretion, the court, in its decision, to be governed by the foregoing conditions. Ib.

10. Deception as used in sec. 3718a, Rev. Stat., means deception because of, or the result of, adulteration and deception caused by imitation and counterfeiting of natural products of food, such as cheese, butter, and all artificial counterfeit foods and drinks. *State v. Marvin.* 593

11. Unlawful labeling, or sale of morphine in a patent medicine, without a "poison" label, is an offense separate from the adulteration and deception in sale of foods and drugs, and is not within the jurisdiction of a justice. Ib.

12. It can hardly be held that the legislature, in the enactment relative to the sale of poisons, intended to include well known proprietary medicines, containing so little poison that the effects are beneficial rather than injurious. Ib.

13. In a prosecution for such sale, evidence that the mixture was not only a proprietary remedy of long standing but also a useful remedy in medicine, that it was non-poisonous and that the effects of said mixture were restorative and curative, is competent and should be admitted. Ib.

QUIET TITLE—

Proceedings to quiet title brought against "the heirs of P., deceased," do not estop the children of P., who was not deceased at the time of the proceedings, especially when they claim as devisees and not as heirs of P. *Archer v. Brockschmidt.* 348

RAILROADS—

1. An extension of a steam railroad may be had under the provisions of the law, as a steam railroad, but a steam railroad cannot be extended as a street railroad. *Cin. Incl. Pl. Ry. Co. v. Cincinnati.* 562

Railway Relief Associations.

RAILROADS—Continued—

2. A company having constructed good and sufficient fences along its right of way, owes no duty to an adjoining owner to see that a gate in such fence which is used exclusively by such owner is kept closed. *Didman v. Railroad Co.* 140

3. The company is not liable absolutely and at once for defects in its fence caused by a third person without its fault. Having built a sufficient fence, it is not liable for defects unless it is negligent. *Ib.*

4. As good and sufficient fences were erected and maintained upon each side of the company's right of way, the company was under no obligation to erect a gate on the crossing between the two tracks. *Ib.*

5. In Ohio in order to make out a *prima facie* case, in an action against a railroad company to recover damages for killing stock, it is necessary for plaintiff to prove affirmatively that the servants in charge of the train were guilty of negligence and that the injury was caused by such negligence. *Ib.*

6. A railroad company in possession and ownership of property acquired by consolidation, foreclosures and sale, in which the consolidation proceedings were regarded as lawful, is not in a position to question the validity of the consolidation as a defense to an action on equipment bonds issued by a constituent company. *Adelbert College v. Railway Co.* 14

7. When the tracks of two railroads cross each other at a common grade or level, the trains or engines passing over such tracks must come to a full stop not nearer than two hundred feet, nor further than eight hundred feet from the crossing, and shall not cross until signalled so to do, nor until the way is clear. *Moulder v. Railroad Co.* 664

8. When two passenger or freight trains approach the crossing at the same time, the train on the road first built shall have precedence. if the tracks are main tracks over which all passenger trains and freights of the road are transported. *Ib.*

9. If one of the trains approaching the crossing is a passenger and the other a freight train, the passenger train would have precedence. *Ib.*

10. Regular trains on time take precedence over trains of the same grade not on time, or having no schedule time. *Ib.*

11. When the construction of a railroad in the street will work mater-

ial injury to abutting property, the owner has such an interest in the street that such construction may be enjoined until the right to construct such road shall first be acquired under proceedings instituted against such owner as is required by law for appropriation of private property. *Root v. Penn. Co.* 315

12. When a former owner has signed a contract with such company, releasing to them all claims for damages by reason of any railway or side track which should be built along there, one who purchases with notice of such contract, is bound by it. *Ib.*

13. Possession by such company of part of the highway at the time of such purchase is constructive notice of the existence of the contract. *Ib.*

14. The agreement in the lease from the C. & M. V. Ry. Co. to the P., C., C. & St. L. Ry. Co., whereby the latter agreed to advance money necessary to pay the coupons on bonds of the former; such advance to be paid out of subsequent earnings and not otherwise, held to be not harsh, oppressive or inequitable, and not to be an agreement to loan money to an insolvent corporation, which the court will not enforce. *Henry v. Railroad Co.* 41

15. Such agreement held not to be conditional upon the furnishing of funds to make certain betterments. *Ib.*

16. The lease of a railroad cannot be rescinded except by the same consent of stockholders required to authorize a lease. *Ib.*

17. The court refused to compel the lessee of a railroad to specifically perform a covenant requiring it to operate the leased line. *Ib.*

18. When the construction of a bridge or other outlet for ditches or drains is not inconsistent with the proper construction and operation of the railroad, it is to be presumed that they will be constructed, and the only injury for which the defendant in an appropriation proceeding can recover damages is the possibility of trouble and a law suit to enforce his rights, but where the building of such bridge or outlet would be inconsistent with a proper construction and operation of the railroad, damages for interfering with the drains and ditches may be awarded. *Railroad Co. v. Snyder.* 480

RAILWAY RELIEF ASSOCIATIONS—

1. One who accepts benefits from a railway relief association is barred from collecting damages. He has his option to accept benefits or sue the company, but cannot do both. *Farrow v. Railroads.* 582

Rape—Receivers.

2. Railway relief association contracts are not against public policy. *Ib.*

3. The act of 1890, so far as it undertakes to prohibit voluntary contracts, such as those referred to, is unconstitutional. *Ib.*

RAPE—

In an action for damages for an assault with intent to commit a rape, evidence that the accused is reputed as a peaceable and quiet citizen is not admissible. *Ryan v. State.* 165

RECEIVERS—

1. The usages of courts of equity, as to manner of appointing a receiver, where it is not otherwise provided by statute, are applicable to cases arising under the code. *Doane v. Donough.* 166

2. In an action to sell a leasehold for non-payment of rent, the court has power to appoint a provisional receiver for the rents. *Ib.*

3. A receiver is never appointed where a court of equity can find other less stringent means to protect the rights of parties. *Jay v. Squire.* 318

4. In an action asking for the appointment of a receiver, defendant cannot urge as an objection to plaintiff's right in court that her interest in the property has been conveyed to her by her husband in fraud of his creditors; that question can only be raised by the husband's creditors. *Ib.*

5. The action of a court or judge in granting a receivership does not determine the ultimate rights of the parties, or even affect them, except so far as it preserves and retains control of the property to answer to the rights of the parties as they may be finally determined. *Ib.*

6. An application for a receiver is an ancillary proceeding; it is not a final remedy. *Ib.*

7. Where plaintiffs' claim of an interest in property was denied by the managing trustee and the court found that they had a probable interest, but did not find that the business was mismanaged or that the trustee was insolvent, it was held, that no receiver would be appointed. *Ib.*

8. Before a court will appoint a receiver under sec. 5484, Rev. Stat., it must be shown that the debtor has fraudulently transferred his property to others, who hold and claim to own the same, and it further appears that if a receiver were appointed who would pursue the persons claiming such property, in a court of competent jurisdiction, that there would be a strong probability that he would re-

cover something which could be applied on the creditor's judgments. *Hayes v. Moore.* 520

9. The comity between states will permit a receiver to collect money due the firm he represents in a state other than the one in which he was appointed, provided no injury is done to a resident in such state. In re *Besuden Co.* 565

10. Therefore, creditors bringing attachment suits in other states, and reaching money due the firm represented by the receiver, are interfering with such receiver in the discharge of his duties, and unless they dismiss the suits may be punished for contempt of court. *Ib.*

11. The receiver of an insolvent corporation asserting a mechanic's lien against the receiver of another insolvent corporation, stands in exactly the same position that the company would have had, were it solvent and in court, presenting its claim, and the other corporation were also solvent and in court. *Iron Co. v. Heating and Ventilating Co.* 292

12. Where the money in dispute is in the hands of the receivers, the receivers are simply the hands of the court, and the money is in court ready for distribution. *Ib.*

13. Judicial tribunals are constituted for the exercise of judicial functions upon legitimate contentions and controversies submitted by parties, and not for the purpose of operating commercial enterprises for the accommodation of those who lack capacity to manage their own affairs. *Bank v. Guckenberger.* 438

14. The appointment of a receiver to conduct the affairs of a corporation is justifiable only as a provisional remedy, ancillary to the securing of some other main and ultimate relief which is sought in action. *Ib.*

15. Where the petition does not ask for the dissolution of the corporation, or show that it is insolvent, but only alleges that the directors refuse to devise ways and means to meet the indebtedness of the corporation: Held, that no grounds for the appointment of a receiver are shown. *Ib.*

16. The fact that the receiver has reserved a sum sufficient to pay the bank in full, in case the litigation in which the bank seeks to overthrow the receivership should be decided in favor of the bank, shows that the receiver was not misled by the bank's acceptance of dividends into believing that it had recognized or conceded the validity of his appointment. *Ib.*

Reformation—Sales.

RECEIVERS—Continued—

17. Where a receiver was appointed and a bank accepted dividends paid by a receiver under an express agreement that its right should not be prejudiced by such acceptance, such acceptance should not estop the bank from assailing the validity of the receiver's appointment. *Ib.*

18. Nor should such estoppel result from a failure on the part of the bank to make specific objections to entries made, authorizing the continuance of the business by the receiver and for the sale of the property by him, where the bank only became a party to the action five months after the suit was instituted, and where there is nothing on the records to show actual knowledge of these entries on the part of the bank. *Ib.*

19. No entry of directions to a receiver can rise to be greater and more comprehensive than the receivership itself; no such entry could but be a thing subservient to the main project and a part of it; therefore, objecting and protesting against the receiver and his appointment carries along an objection and protest to any entries in reference to such receiver. *Ib.*

REFORMATION—

1. A court of equity will not reform an ineffectual voluntary conveyance so as to give one creditor preference over another creditor where their equities are equal. *Stoltz v. Vanatta.* 34

2. A court of equity will not reform a deed on an allegation of mutual inadvertence of parties to the transaction, for the purpose of making such preference. *Ib.*

3. The probate court has jurisdiction to reform a mortgage where an assignee for benefit of creditors petitions to sell the land of the assignor, and a mortgagee by cross-petition asks for reformation of his mortgage in which the premises in question are incorrectly described. *Adlard v. Stockstill.* 493

RES ADJUDICATA—

1. A ruling by one member of the court of common pleas in one stage of a case will be followed by the other member of such court in the subsequent stages of the case, or in another case between the same parties. *Walbridge v. Union Mfg. Co.* 203

2. The court having ruled that creditors could not intervene in an action for the appointment of a receiver to subject the assets of the corporation and stockholders' liability,

but must bring an independent action for that purpose, it became incumbent on the other members of the court to allow a separate suit to foreclose a mortgage against the corporation and to hold the action for the appointment of the receiver no bar thereto. *Ib.*

RIGHTS—

Every right that can be made the subject of an action for the recovery of damages, is a right of property, including the right to the comfort and society of a wife or a minor child. *Boescher v. Boescher.* 154

RULE IN SHELLEY'S CASE—

1. Where, before the rule in Shelley's case was changed in its application to wills, by statute, a testator devised lands to his sons in fee simple, and by a later clause in the will explained that it was his intention that the sons should hold the property during their natural lives, and after their deaths the property to be to their respective heirs-at-law in fee simple: Held, that the later clause expressing the clear intention would prevail. The rule in Shelley's case would not apply and the devisees took only a life estate. *Archer v. Brockschmidt.* 348

2. The purchaser of such life estate at judicial sale cannot enlarge the estate by buying the tax title and receiving an auditor's deed. *Ib.*

SALES—

1. Where goods are sold on the installment plan a refunder is required if the goods are taken back. *Jeffries v. Draper.* 160

2. In an action on a warranty alleging certain defects in a machine, such allegations must be specific. *Jonte v. Foundry & Machine Co.* 162

3. An action to foreclose a vendor's lien is not a taking possession of property whereby the vendee or a judgment creditor acquires a right to a tender or a return under the conditional sale act, sec. 7913, Rev. Stat. *Nat'l Cash Reg. Co. v. Born & Co.* 99

4. It is competent for the parties in a contract of sale to settle between themselves the time when the property should vest in the purchaser, and it is competent to inquire what the parties intended. *Davis v. Parker.* 152

5. When the terms of a sale of specific goods are agreed upon, and the bargain is struck and everything which the seller has to do with the goods to complete contract, the sale becomes, in general, perfect and the property remains at the risk of the buyer. *Ib.*

Schools—Stolen Money.

SCHOOLS—

1. Boards of education are bound under our laws to provide accommodations for all pupils legally entitled to attend school and who desire to do so. *In re Board of Education.* 578

2. County commissioners have the right, and it is their duty, to elect a superintendent for the public schools, when the school board fails to agree upon a selection. *State v. MacKinnon.* 558

3. The law requiring boards of education to pay assessments for street improvements out of their own funds is unconstitutional. *In re School Property.* 577

SENTENCE—

A sentence to take effect after the expiration of a prior sentence is void if the law under which the first was imposed is declared unconstitutional before the prisoner served his first sentence; and, therefore, the first being a nullity, the second sentence is void for uncertainty, and the prisoner is entitled to a discharge. *Ex parte Jordan.* 397

SET-OFF—

The principles of set-off are not applicable as between a debt owing by a partnership and a debt owing to the partners as tenants in common. *Fuher v. Buckeye Supply Co.* 187

SEWERS—

1. A property owner's remedy, where a city constructs a sewer under the sidewalk, is by suit for damages, not by injunction to prevent construction of the sewer. *In re Pavement.* 573

2. Where a lot is already provided with sewer drainage, the owner cannot be assessed for another sewer. *Miller v. Toledo.* 162

3. The only limitations upon amount of sewer assessments are those contained in the sub-division specially relating to sewers. *Macomber v. Hunter.* 96

SPECIFIC PERFORMANCE—

1. The rule of mutuality that specific performance will not be decreed in favor of one against whom it could not be decreed, does not apply where the one seeking specific performance has already performed, although equity could not have compelled performance on his part. *Hepburn v. Voute.* 311

2 Specific performance of an agreement, "to keep a first class liv-

ery at said boathouse," cannot be compelled in equity. *Ib.*

STATUTES—

1. Whenever a statute admits of two constructions the presumption should be that the legislature intended to do that which is clearly manifest and just. *State v. Marvin.* 593

2. The presumption against absurdity in the provisions of a legislative enactment is probably a more powerful guide in construction than the presumption against inconvenience and injustice. *Ib.*

3. When, therefore, to follow the words of an act leads to an absurdity in its consequences, that constitutes sufficient authority to depart from them. *Ib.*

4. Section 6607, Rev. Stat., construed with secs. 6608 and 6547, does not, in forcible entry and detainer, limit the right of trial by jury to a demand either on return or appearance day. *Miller v. Schmidt.* 4

5. Section 4983, Rev. Stat., requires that action for slander shall be commenced within one year. *Pearl v. Koch.* 5

6. In a court of law this statute must receive a strict construction, and no exception can be introduced not authorized by the legislature. *Ib.*

7. The "substantial defect" contemplated by 75 O. L., 313, must relate to the construction provided for by a contract legally adopted. *Toledo v. Grasser.* 178

8. The act of May 1, 1856 (1 S. & C., 327), authorizing a railroad company whose line shall be made to a point in another state to consolidate with the company or companies of "an adjoining state" may as properly be construed to mean the state adjoining the state in which the first company has its line of road as the state adjoining the state in which the first company is incorporated. *Adelbert College v. Railway Co.* 14

STOLEN MONEY—

1. Title to money which has been stolen and paid by the thief to an innocent party, in the ordinary course of business, passes to such innocent party. *Price v. Schwartz.* 554

2. Where the money, in the form of a \$100 bill, having passed into the hands of an innocent holder, is surrendered to the city to be used in the trial of the thief, and the city subsequently pays a sum equivalent to the bill to the innocent party, the city thereby acquires title to the bill. *Ib.*

Street Railways—Streets.

STREET RAILWAYS—

1. The meaning of the term street railway as used in our statutes is a track for the running of vehicles which is on a grade with the street, that is filled in between the rails so that the public can use it as well as the street railway company, and built in the middle of the highway, so that burdens imposed on abutting owners on one side of the street are no greater than those imposed upon the abutting owners on the other side. *McMaken v. Elec. St. R. R. Co.*

2. Where a turnpike company grants a street railway company the right to lay its tracks in a public highway over which the turnpike company had an easement, the railway company can gain no greater rights than the turnpike company possessed, and an abutting owner is entitled to a perpetual injunction restraining the railway company from constructing its tracks in such a way as to impair the egress and ingress to and from his property. *Ib.*

3. An extension of a steam railroad may be had under the provisions of the law, as a steam railroad, but a steam railroad cannot be extended as a street railroad. *Cinc. Incl. Pl. Ry. Co. v. Cincinnati.* 562

4. And a street railroad, operating under a charter authorizing a steam railroad, cannot be extended by condemnation or appropriation. *Ib.*

5. It is the duty of a railway company at a crossing, used as such by the public and recognized as such by the company, to keep in mind the right of pedestrians on that crossing, and its duty to observe the rights of its own patrons who are under the necessity of using that crossing in going from its cars to their destination. *Altmeier v. Cin. St. Ry. Co.* 655

STREETS—

1. The statute authorizing county commissioners to improve rural streets is unconstitutional. *Sullivan v. Williams.* 577

2. A property owner has no rights in a street or the space under a pavement which are not subject to a city's prior right. *In re Pavement.* 573

3. The control and regulation of the streets, alleys and highways of the city of Cincinnati are in the municipal boards. *Cin. Inc. Pl. Ry. Co. v. Cincinnati.* 562

4. The revenue derived for the use of the streets is the exclusive property of the city, and the right to define and determine the mode of the use of streets, as well as the conditions

under which they should be used, is an exclusive privilege given by the statute to municipal authorities. *Ib.*

5. Such rights are not, in the purview of the law, to be fixed by proceedings in condemnation or appropriation. *Ib.*

6. While "making" a street might include the laying of a sewer in it, if the circumstances made a sewer a necessary part of its construction, yet the laying of a sewer is not *per se* the "making" a street, within the meaning of sec. 2283, Rev. Stat. *Cincinnati v. Fugman.* 530

7. Where a city for thirty years has adopted and used a street without change of grade, and a property owner makes his improvements, relying on such grade, and afterwards the city causes a change resulting in damage to such owner, then the city is liable for such injuries. *In re Street Improvement.* 697

8. In determining whether the grade has been permanently fixed the street must be considered in a much broader sense than its mere relation to the property owner's premises or the immediate vicinage. *Ib.*

9. It must be taken with reference to the general uses and purposes to which the street is devoted by the city and the public. *Ib.*

10. Misrepresentations of a city engineer as to the ordinance grade of a street established by the city, or the depth of a cut, cannot serve as a foundation for an action against a city, if the improvement is actually made to the grade established. *Ib.*

11. Both the owner of abutting lands and the city must act reasonably in the matter of making improvements, both having reference to such future use as the wants of the public reasonably require. *Ib.*

12. The fact that a municipality reasonably delays making expensive improvements is not to be treated as a waiver of its right or intention to properly improve the street when it becomes, in its discretion, reasonably proper so to do and as the needs of the public require. *Ib.*

13. What is reasonable is wholly within the discretion of the municipal authorities, so long as such discretion is reasonably exercised under the circumstances of the given case. *Ib.*

14. It is the duty of a city having established or changed the grade of a street, to have such plan and profile on file as will readily advise persons of ordinary intelligence of the extent the proposed improvement will affect property owners' premises. *Ib.*

Subrogation—Trial.

15. If the plan and profile fail to give such information, or give it in such a way as requires one skilled in such work to understand, and the property owner is not so skilled, it is competent for him to go to the city engineer, and seek the necessary information and to rely upon the statements of such engineer. Ib.

16. Where a property owner, acting in good faith, relies on statements of city engineer, and accepts a certain sum in satisfaction of his damages, such property owner is not to be barred from maintaining an action to recover additional damages. Ib.

17. Where there were no specifications, etc., on file at the time a resolution to improve a street was passed, but such specifications were on file and approved by the council before the passage of the ordinance providing for the doing of the work in accordance with the resolution; whether such specifications were even adopted by the council *quare*. Toledo v. Grasser. 178.

SUBROGATION—

1. A mortgagee is not subrogated to a vendor's lien. Gashe v. Ohio Lumber Co. 130

2. Subrogation by act of parties may take place by the debtor's agreement that one paying a claim shall stand in the creditor's shoes. Ib.

SUMMONS—

1. Where a railroad enters a township by a ferry boat only, service of summons from a magistrate's court may be made on a ticket agent in his township, and such service will be held to be in compliance with sec. 6748, Rev. Stat. Williams v. Railroad Co. 31

2. Service upon a wife, who does not live with her husband, is not obtained by leaving summons at the residence of the husband. Ault v. Jones. 558

3. Members of the state board of arbitration cannot be sued in a civil action or in any county of the state while transacting official business. White Sewing Machine Co. v. Hawes. 568

SUNDAY LAWS—

1. Section 7032a, Rev. Stat., relating to base ball playing on Sunday, and making it an offense to play base ball on Sunday, is constitutional. State v. Goode. 281

2. A Sunday saloon closing ordinance which fails to make exceptions, provided in the Dow law (83 O. L., 157), for exclusively known medicinal

pharmaceutical or sacramental purposes, contravenes the general policy of the state and is void. Columbus v. Schaerr. 100

SURETIES—

1. A surety upon an appeal bond is a debtor, and within the class of debtors covered by the statute relating to the conveyance of property in fraud of creditors. In re Appeal Bond. 571

2. Funds of an insolvent estate in the hands of an administrator are subject to taxation. In re Robb. 227

TAXATION—

1. Funds of an insolvent estate in the hands of an administrator, unlike assets in the case of an assignment, are subject to taxation. In re Robb's Estate. 381

2. The rights of a purchaser at a judicial sale as to payment of taxes out of the proceeds, are fixed by date of sale, and after confirmation relate back to that date. Schied v. Schied. 559

TELEGRAPH COMPANY—

It is not a crime, under the laws of Ohio, to tap a telegraph wire, unless a message was taken. Martin v. Sheriff. 100

TENANTS IN COMMON—

Where one tenant in common mortgages the property and gives possession to the mortgagees, the other tenants in common must be given their share of the income in the hands of the mortgagee before mortgagee can apply such income on the mortgage. Fuher v. Buckeye Supply Co. 187

TORTS—

In an action for a tort, wherein punitive damages were recoverable, the judgment will not be reversed on the ground that evidence showing the pecuniary condition of the defendant was admitted. Lamprecht v. Crane. 753

TRIAL—

1. Counsel must not comment upon failure of defendant to testify in his own behalf, and such fact cannot be taken into consideration by the jury. State v. Bennett. 341

2. Where more than three terms have intervened since the return of an indictment, without bringing case to trial, accused is entitled to discharge, without regard to what disposition the prosecuting attorney may have made of the case. State v. Barrett. 581

Trespass—Wills.

TRESPASS—

1. Where a person is a trespasser on the ground of a railroad company, and is there for no lawful purpose or as a loiterer, the company, by its employees, has the right, first ordering him to leave, to employ such force as will reasonably eject him therefrom. *State v. Pate.* 732

2. If a person is rightfully upon such ground, no one has the right to drive him away, and in that event he could use such force as would maintain his rights, and, if necessary to maintain them, he would be justified in killing his adversary. *Ib.*

TRUSTS—

1. A managing trustee should allow any one claiming an interest in the business to see the accounts of the business. *Jay v. Squire.* 318

2. An assignee in an assignment for benefit of creditors is a trustee in every case. *In re Jones.* 233

3. A trustee is one to whom property is committed in trust, whether for some specific use or for the benefit of general creditors. *Ib.*

4. A trustee is also an assignee when the property held in trust by him has been assigned to him. *Ib.*

5. The meaning of the words, "to dispose of," as used in a declaration of trust, must be determined from themselves, from their context and by application to the subject-matter. *Andrew v. Auditor.* 242

VENDOR'S LIEN—

An action to foreclose vendor's lien is not a taking possession of property whereby the vendee or a judgment creditor acquires a right to a tender or a return under the conditional sale act, sec. 7913, Rev. Stat. *Nat'l Cash. Reg. Co. v. Born & Co.* 99

VERDICT—

A verdict will not be set aside by reason of misconduct of any juror, if the party making the motion had knowledge of the misconduct during the continuance of the trial, and the party filing the motion must show that he did not have such knowledge. *Thomas v. Commissioners.* 610

WATERCOURSE—

1. In a prosecution under sec. 6921, Rev. Stat., for the pollution of a stream, each party is entitled to offer the best available proof of the condition of the water. *Burch v. State.* 137

2. An error in excluding the best proof, above defined, as to condition of stream subsequent to date of information, is not waived nor cured

by admission of an analysis of water by the same witness made prior to the information. *Ib.*

3. When a witness for the prosecution had testified to the corrupt and offensive smell of water as it left defendant's drain, cross-examination tending to show that the water was pure at the point where it left defendant's premises was pertinent as bearing on the issue whether the corruption was to the prejudice of others, and its refusal was substantial error. *Ib.*

4. No amount of corruption by one person can excuse the wrongful acts of another, but evidence tending to prove corruption of the stream both above and below defendant's premises, was competent to show that corrupt matter found in the water was not put there by defendant and its rejection was substantial error. *Ib.*

5. Proof of record of board of health of township having jurisdiction, showing that they examined, approved and gave defendants a permit to construct their system of drainage, which it is alleged, corrupted the stream, is competent in a prosecution, under sec. 1788, Rev. Stat., in the police court of Cincinnati, at least in mitigation of the penalty. *Ib.*

6. Whether such proceeding and permit by the board of health would be a complete defense in a prosecution on a criminal charge, *quare?* *Ib.*

7. If a complete defense in such prosecution it would not, however, be a bar to a recovery of damages at the personal suit of a neighbor, nor in an action in equity to enjoin a private nuisance, doing special injury to the person or property of another. *Ib.*

WILLS—

1. When a will is shown to have been in the custody of the testator and is not found at his death, the presumption is that he destroyed it. *In re Wiswell's will.* 401

2. But this presumption may be rebutted by evidence, and testator's subsequent declarations are admissible to show the contrary. *Ib.*

3. When the evidence showed that testator, after making his will, frequently spoke of its contents, and gave his reasons for making it; that he was in the same state of mind five days before he died, being twenty-seven days before it was claimed the will was destroyed; and the circumstances showed that he was too ill to have destroyed his will on the day alleged, and there was no claim that he made any other will, a copy of the will was entitled to probate. *Ib.*

Wills.

4. The jurisdiction of the probate court is limited to the inquiry as to whether the forms of law have been complied with in the execution of a will, the condition of mind and capacity of testator to make disposition of his property. In *re Oskamp's will*. 584

5. It has no jurisdiction to take notice, in opposition to a will, of the process of evolution appearing in the will and its various codicils, whereby executors were reduced from three to one, and the character of the trust made more favorable to the one remaining executor, as indicating undue influence upon testator. *Ib.*

6. A will having been admitted to probate, letters must necessarily issue to the executor named therein. The remedy in case of his unfitness is by motion to remove. *Ib.*

7. The probate court has jurisdiction to admit to record a copy of the last will of a person who dies while temporarily residing in this county, leaving personalty but no realty therein. In *re Blymeyer's will*. 399

8. Section 5943, Rev. Stat., providing for the probate of a will within a certain time by a devisee who knows of its existence, and has the same in his power to control, under a penalty of forfeiture of his interest therein, has no application to a case in which the issue is whether the will presented for probate is the last will and testament of testator. *Ib.*

9. Declarations of a testator are admissible to rebut the presumption of the revocation or destruction of a lost will. *Ib.*

10. A will executed by a citizen of this state, while temporarily residing abroad, although executed in accordance with the laws of a foreign country, is a domestic will and can be probated and the estate administered here. In *re Faber's estate*. 575

11. Where, in case of a will executed abroad, it is impossible to present the original will for probate, as, for instance, a will executed in Germany and written in the book of wills, a properly authenticated copy will be admitted in its place. *Ib.*

12. An action can be maintained by an executor under sec. 6202, Rev. Stat., to obtain the judgment of the court as to the true construction of a will only in cases where a trust is involved. *Chase v. Isherwood*. 1

13. An action to obtain such construction will be dismissed for want of jurisdiction, when such will

relates to real estate over which the executor had no concern. *Ib.*

14. A provision in a will that there shall be no division of the estate until ten years after testator's death is valid, and there can be no lawful partition until that time. In *re Reynold's estate*. 570

15. A will which devises property to the wife to do with as she pleases, what remains at death to go to testator's niece, conveys the property absolutely to the widow. In *re Will*. 584

16. H. by will gave her property, after payment of debts and legacies, to her children to be divided equally. She directed that her property shall not be divided until the youngest child becomes of age, and that all expenses for the natural support or education of the two younger children shall be paid out of proceeds of her estate as a whole. Held, that such will will be construed to allow income of estate to be used for support and education of minor children, but no part of the principal. *MacGahan v. Kleiner*. 94

17. In an action to contest the validity of a will after the defendant had offered the will and a certified copy of the order of probate in evidence, and the plaintiff had called one of the witnesses on whose testimony the will had been admitted to probate, who testified that he did not sign the will as a witness in the presence of the testator, the defendant may then call other witnesses to the will not called in the probate thereof, and prove by them that they signed it, as witnesses, in the presence of the testator, and thereby prove the due execution of the will. *Trembley v. Trembley*. 750

18. Where the name of the testator was not signed by himself but by another person by his direction, the person so signing may be a witness to the execution of the will. *Ib.*

19. Where another person signed the name of the testator to the will by his direction and in his presence, such signing is equivalent to a formal acknowledgment of the signature. *Ib.*

20. Where one of the witnesses to the execution of the will was the person who signed it for the testator, by his direction and in his presence, and the other witness heard the testator acknowledge the signature and the will to be his, and signed it as a witness in the presence of the testator, the execution of the will was sufficiently proved. *Ib.*

Witnesses—Words.

WITNESSES—

1. A conservative and safe rule, when witnesses contradict each other, is to give the preference to the one who has the least inducement, from interest or other motive, to testify falsely, other things being equal. *State v. Iden.* 627

2. It is competent for witnesses in an appropriation proceeding to testify as to all the different ways in which injury may result to the defendants from the building of the railroad, but not as to the amount of damages which would compensate for such injuries. *Railroad Co. v. Snyder.* 480

3. Where a person who has committed a crime is a witness before a court and jury, the fact that his crime involved in any sense moral turpitude is a fact which should be taken into consideration as affecting the weight and value of his testimony. *In re Commissioners.* 691

4. To make the testimony of a witness the absolute ideal truth, upon which practical action can, with perfect safety, be taken, he should be a person of fair character, of good habits and of reasonable integrity and fidelity in the discharge of his duties. *Ib.*

WORDS—

1. The term "legislature" is synonymous with that of "general assembly." *State v. Gear.* 569

2. The term "estopped" is no synonym for "assent." *Bank v. Guckenberger.* 438

3. The word "may" as used in sec. 6901, Rev. Stat., means *must*. *In re Thornton.* 151

4. The words "owner or owners" as used in sec. 6448, Rev. Stat., if unlimited, might possibly include the owner of an equitable as well as a legal title. *Rapp v. Railroad Co.* 453

5. The meaning of the word "premises" as used in secs. 4467 and 4468, Rev. Stat., means lands and surrounding country. *Emig v. Commissioners.* 459

6. The word "public" in sec. 4469, Rev. Stat., as used in connection with the words, "health, convenience or welfare," has reference to the people of the neighborhood. *Thomas v. Commissioners.* 503

7. The meaning of the words, "to dispose of," as used in a declaration of trust, must be determined from themselves, from their context and by application to the subject matter. *Andrew v. Auditor.* 242

8. The phrase, "any attorney" as used in a power of attorney to confess judgment, fails to identify any person at all as clothed with authority. *McClure v. Bowles.* 238

9. The word "aid" as used in sec. 6804, Rev. Stat., means to help or assist or strengthen; the word "abet" means to encourage, counsel, incite or assist in a criminal act; and the word "procure" means to persuade, to induce, to prevail on, to cause, to bring about. *State v. Snell.* 670

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